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CH. 42
REASONABLE DOUBT

Top

§42-1
General Rules

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) After **In Re Winship**, the critical inquiry on review of the sufficiency of the evidence is not simply whether the jury was properly instructed, but whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Fiore v. White, 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (2001) The due process clause of the federal constitution requires that a conviction be vacated where after the conviction became final, the State Supreme Court held that the statute defining the offense did not apply to defendant's conduct.

Eaton v. Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974) The State reviewing court denied due process by upholding a contempt order on the basis of remarks not found to be contemptuous by the trial court.

People v. Cunningham, 212 Ill.2d 274, 818 N.E.2d 304 (2004) When determining if the evidence was sufficient to establish guilt beyond a reasonable doubt, the reviewing court must determine whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Because the standard of review for reasonable doubt questions requires the court to determine whether the evidence could "reasonably" support a guilty verdict, the trial court's determinations of credibility are not conclusive.

When viewing the evidence most favorably to the prosecution, the reviewing court must indulge all *reasonable* inferences in favor of the prosecution. The court may not make *unreasonable* inferences, however. Thus, if the record supports only one inference, the court must accept it even if it favors defendant.

People v. Lambert, 104 Ill.2d 375, 472 N.E.2d 427 (1984) A defendant may not be convicted of a crime based solely on his confession. The law "requires that the prosecution introduce evidence outside the confession that tends to prove that the offense occurred." See also, **People v. Wright**, 286 Ill.App.3d 456, 677 N.E.2d 494 (1st Dist. 1997) (request to "relax or dispense" with *corpus delicti* rule must be addressed to the Illinois Supreme Court).

People v. Willingham, 89 Ill.2d 352, 432 N.E.2d 861 (1982) A conviction may not be based upon a confession alone. Instead, "in order for a conviction based upon a confession to be sustained the confession must be corroborated." This "corroboration requirement is satisfied

by proof of the *corpus delicti*." To establish the *corpus delicti* there must be some evidence, independent of the confession, demonstrating that a crime occurred; once such a showing is made, the same independent evidence may be considered along with the confession in determining whether the State proved beyond a reasonable doubt that a crime was committed and that the accused committed it.

Here, defendant's confession was corroborated by his trial testimony that a robbery had been discussed and that, though he objected to the robbery, he accompanied the accomplices to the scene. Additional corroborating evidence consisted of testimony that placed defendant's car and a person who resembled defendant at the crime scene.

People v. Pintos, 133 Ill.2d 286, 549 N.E.2d 344 (1989) The standard of proof necessary to convict defendant with circumstantial evidence is no different than with direct evidence. The "reasonable hypothesis of innocence standard," which was previously used for reviewing the sufficiency of evidence in cases which were entirely circumstantial, is "no longer viable in Illinois."

People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96 (1958) If a conviction is to be sustained, it must rest on the strength of the People's case and not on the weakness of defendant's; this rule is a corollary of the presumption of innocence.

People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966) The prosecution has the burden of proving beyond a reasonable doubt all the material and essential facts constituting the crime. The burden of proof never shifts to the accused, but remains the responsibility of the prosecution throughout the trial.

People v. Hendricks, 137 Ill.2d 31, 560 N.E.2d 611 (1990) After defendant had been found guilty of murder by a jury, the trial judge said at sentencing, "Based on the evidence admitted on trial against the defendant I am not personally convinced that he has been proven guilty beyond a reasonable doubt." Defendant contended that based upon the foregoing statement, the trial judge should have directed a verdict of acquittal.

The "trial judge's statement that he, personally, would have acquitted the defendant is immaterial so long as the evidence was sufficient to prove guilt beyond a reasonable doubt." Conviction affirmed.

People v. Green, 17 Ill. 2d 35, 160 N.E.2d 814 (1959) At sentencing, defendant made a statement admitting guilt and detailing the offense. Defendant's statement constituted a judicial confession and prevented him from raising a reasonable doubt issue on appeal.

People v. Jefferson, 24 Ill.2d 398, 182 N.E.2d 1 (1962) It is the function of the reviewing court to carefully examine the evidence, giving due consideration to the fact that the court and jury saw and heard the witnesses. If after such consideration the reviewing court is of the opinion that the evidence is not sufficient to establish defendant's guilt beyond a reasonable doubt, the conviction must be reversed.

People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267 (1985) A conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. It is not the function of the reviewing court to retry the case. The relevant inquiry is whether, after reviewing the evidence in the light most favorable to the

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

People v. Hall, 194 Ill.2d 305, 743 N.E.2d 521 (2000) A reviewing court may not reverse a conviction where the evidence, viewed most favorably to the prosecution, would permit a rational trier of fact to find that the essential elements of the crime had been proven beyond a reasonable doubt. Circumstantial evidence is sufficient to sustain a conviction where it provides proof beyond a reasonable doubt of all the elements of the crime.

The evidence was sufficient to prove defendant's guilt of first degree murder beyond a reasonable doubt where there was "credible evidence" that the weapon used to inflict the fatal blow was procured by defendant's wife and delivered to defendant shortly before the murders, a neutral witness testified that shortly before the offenses defendant used a shotgun to angrily order the decedents out of their vehicle, and defendant made inculpatory statements shortly after the murders. In addition, circumstantial evidence showing that the crime had been committed by someone other than defendant was not credible.

People v. Brooks, 187 Ill.2d 91, 718 N.E.2d 88 (1999) The evidence was sufficient to prove guilt of first degree murder and attempt first degree murder. Although two of the four eyewitnesses who testified recanted their identifications of defendant, the first recantation was not credible where the witness said he was being forced to change his testimony, the recantation came during a "truce" between rival gangs involved in the shooting, the witness denied having come to court in the company of a particular individual with whom he subsequently left, and there was testimony that the witness had been threatened.

Similarly, the second recantation was not sufficient to vitiate the convictions. Because there were two different versions of what the witness allegedly saw, it was for the trier of fact to determine which to believe. Viewing the evidence in a light most favorable to the State, a reasonable trier of fact could have found defendant guilty. See also, **People v. Brown**, 303 Ill.App.3d 949, 709 N.E.2d 609 (1st Dist. 1999) (whether recanted prior inconsistent statements are sufficient to sustain a conviction depends on whether, after reviewing the evidence most favorably to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; evidence consisting solely of disavowed statements made nearly two years after the crime by a witness who feared that he was about to be charged with a drug offense was insufficient); **People v. Zizzo**, 301 Ill.App.3d 481, 703 N.E.2d 546 (2d Dist. 1998) (evidence was sufficient where jury could have reasonably concluded that prior statement was true and subsequent statements were false).

People v. Smith, 185 Ill.2d 532, 708 N.E.2d 365 (1999) Where the sufficiency of the evidence is challenged, the reviewing court must affirm the conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The reviewing court must give "due consideration to the fact that the court and jury saw and heard the witnesses."

The testimony of the State's principal witness was insufficient to permit a rational trier of fact to conclude that the elements of the crime had been proven beyond a reasonable doubt. The witness was rebutted by several other witnesses, and one theory of the guilt was both unsupported by any direct evidence and presented by the State only in rebuttal closing argument, when the defense could not respond. Furthermore, the credibility of the State's witness was severely impeached, and she had a motive to lie in order to deflect suspicion from her sister and exonerate her sister's boyfriend.

Although the positive and credible testimony of a single witness is sufficient to convict, "no reasonable trier of fact" could have found the witness credible in light of the "serious inconsistencies" in her testimony and repeated impeachment. Further, the circumstantial evidence linking defendant to the murder - his presence at the scene and dark clothing - "merely narrowed the class of individuals who may have killed the victim, without pointing specifically to defendant." The court concluded:

> "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. While there are those who may criticize courts for turning criminals loose, courts have a duty to ensure that all citizens receive those rights which are applicable equally to every citizen who may find himself charged with a crime, whatever the crime and whatever the circumstances.
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> "When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim. No citizen would be safe from prosecution under such a standard."

People v. Hagberg, 192 Ill.2d 29, 733 N.E.2d 1271 (2000) Under appropriate circumstances a field test, standing alone, can establish the nature of a suspected controlled substance beyond a reasonable doubt.

People v. Zizzo, 301 Ill.App.3d 481, 703 N.E.2d 546 (2d Dist. 1998) Defendant did not waive his reasonable doubt argument by failing to raise the issue in the trial court. Under Illinois law, the sufficiency of the evidence may be challenged for the first time on appeal.

People v. Thomas, 277 Ill.App.3d 214, 660 N.E.2d 184 (1st Dist. 1995) Although the issue had not been raised by either party, the Appellate Court held *sua sponte* that the evidence was insufficient to prove defendant's guilt beyond a reasonable doubt.

People v. Devine, 295 Ill.App.3d 537, 692 N.E.2d 785 (1st Dist. 1998) The trial court erred at a bench trial for theft by stating that defendant had failed to rebut the State's *prima facie* case of guilt. Because the trial court improperly shifted the burden of proof to defendant and deprived him of the presumption of innocence and the right to have his guilt proven beyond a reasonable doubt, a new trial was required.

People v. Hodogbey, 306 Ill.App.3d 555, 714 N.E.2d 1072 (1st Dist. 1999) The jury could not have convicted defendant because they disbelieved his testimony denying the offense. "Because the burden of proof never shifts, a reasonable doubt is created by the insufficiency of the evidence introduced by the State. . . That the jury may have disbelieved the testimony of defendant will not excuse the State's failure to produce evidence sufficient to carry its burden of proof."

In re D.A., 114 Ill.App.3d 522, 448 N.E.2d 1036 (2d Dist. 1983) Respondent's delinquency adjudication for commission of arson was reversed on the ground that the *corpus delicti* of the offense was not proved by any evidence independent of respondent's admission.

A State witness testified that the respondent admitted setting the fire. The witness also identified a letter from respondent that acknowledged setting the fire. However, the State failed to introduce any other evidence tending to prove that someone was criminally responsible for the fire. (The State's expert witness, a fire investigator, testified that the fire started in a certain location, but did not testify that it appeared to have been deliberately started.)

People v. Kokoraleis, 149 Ill.App.3d 1000, 501 N.E.2d 207 (2d Dist. 1986) At a jury trial, defendant was convicted of murder and rape. The rape conviction was reversed on the ground that defendant's confession was not corroborated by other evidence.

While there was corroboration of murder, "independent evidence of one offense does not allow use of a defendant's confession for all crimes for which the defendant is charged regardless of whether or not independent evidence of the other crimes exists in the record."

People v. Harris, 333 Ill.App.3d 741, 776 N.E.2d 743 (1st Dist. 2002) In **People v. Dalton**, 91 Ill.2d 22, 434 N.E.2d 1127 (1982), the Supreme Court found that the corroboration requirement was unnecessary where defendant's statements are inherently reliable, such as statements about one's age. The **Dalton** court refused to abolish the corroboration rule for other statements, however.

Here, defendant's uncorroborated statement (that he had been living at a new address for more than a month) was insufficient to establish the offense of failure to report a change of address within ten days, as required by the Sex Offender Registration Act (730 ILCS 150/6). The only corroborating evidence offered - that a detective had talked to an unidentified "person" at the probation department and was told that defendant had been living at the new address "for some time" - was too vague to corroborate defendant's statement that he had failed to register within ten days of moving to the new address.

People v. Dorsey, 362 Ill.App.3d 263, 839 N.E.2d 1104 (4th Dist. 2005) Despite defendant's admissions that he intended to acquire additional chemicals and produce 100 grams of methamphetamine, a conviction for unlawful possession of a methamphetamine manufacturing chemical with intent to manufacture methamphetamine could be entered only for the quantity of meth that could be produced from the chemicals in defendant's possession at the time of his arrest.

People v. Pendleton, 307 Ill.App.3d 966, 719 N.E.2d 320 (3d Dist. 1999) Where the State charged defendant with only one of two alternative methods under which the crime could be committed, the Appellate Court refused to affirm the conviction on the theory that had not been charged. The State "may not offer a new theory of guilt for the first time on appeal"; it would be "manifestly unfair to uphold a conviction based on a charge defendant was never given the opportunity to defend." See also, **People v. Smith**, 183 Ill. 2d 425, 701 N.E.2d 1097 (1998) (on appeal, State could not argue new predicate offense for felony murder).

People v. Sullivan, 234 Ill.App.3d 328, 600 N.E.2d 457 (2d Dist. 1992) Conviction for battery of defendant's mother reversed. A prior inconsistent statement is admissible as substantive evidence only if the witness acknowledges under oath that the statement was made. Here, the

mother denied having made the statement to the officer, and there was no other evidence of guilt.

However, the conviction for battery of defendant's father was affirmed. A reasonable trier of fact could have convicted based on the blood on the father's lower lip, a broken beer bottle found at the scene, the mother's testimony that defendant had been drinking and there had been an argument, and the father's prior inconsistent statement and motive to falsify.

People v. Arcos, 282 Ill.App.3d 870, 668 N.E.2d 1177 (1st Dist. 1996) A conviction based on prior inconsistent statements admitted as substantive evidence was reversed where the declarant testified at trial and disavowed the prior statements. The corroborating evidence was insufficient to establish defendant's guilt.

People v. Virella, 256 Ill.App.3d 635, 628 N.E.2d 268 (1st Dist. 1993) In announcing the verdict, the trial court said that the "totality of the State's evidence was clear and convincing." In addition, in ruling on the post-trial motion the trial judge said three times that the State's evidence had been "clear and convincing." By making four separate references to his belief that the evidence was "clear and convincing," the trial judge gave "strong affirmative evidence" that he had applied the wrong standard of proof.

People v. Davis, 278 Ill.App.3d 532, 663 N.E.2d 39 (1st Dist. 1996) Guilt cannot be inferred merely from motive and opportunity to commit the offense. Furthermore, it is unfair to attribute motive without a factual basis.

People v. Peterson, 273 Ill.App.3d 412, 652 N.E.2d 1252 (1st Dist. 1995) In a joint bench trial, codefendants were convicted of aggravated discharge of a firearm, aggravated battery with a firearm, armed violence and aggravated battery of a senior citizen. The evidence showed that codefendants became engaged in an altercation and started shooting at each other. A bullet struck an innocent bystander; however, it was unclear which defendant had fired the shot in question. Because the identity of the defendant who fired the shot could not be determined, the elements of aggravated battery with a firearm could not be proven against either defendant.

People v. Mills, 356 Ill.App.3d 438, 825 N.E.2d 1227 (2d Dist. 2005) Defendant's conviction for theft of labor or services was reversed. Defendant had been a repeat customer at a Maaco shop. He had the locks on his truck replaced and months later returned complaining about how they were working. Over the telephone, he was told that they would have to be repaired. A verbal authorization for the repairs was made over the telephone. When defendant came to pick up the truck, he was presented a bill and disputed whether he should pay. He drove away without paying.

The evidence only established that there was an honest dispute about the cost of the services, and no evidence beyond a reasonable doubt that defendant knew he was going to be charged for the repairs.

People v. Bailey, 333 Ill.App.3d 888, 776 N.E.2d 824 (3d Dist. 2002) Although defendant's credibility was "called into question" because he allegedly gave conflicting statements, "a lack of credibility is not enough to establish that [defendant] had knowledge of the presence of the weapon in the vehicle."

People v. Hawkins, 311 Ill.App.3d 418, 723 N.E.2d 1222 (4th Dist. 2000) Where the charging instrument failed to denote which of several subsections of a statute has allegedly been violated, the conviction should be affirmed if the evidence was sufficient to support conviction under any of the subsections.

People v. Rodgers, 322 Ill.App.3d 199, 748 N.E.2d 849 (2d Dist. 2001) Under 625 ILCS 5/6-303(a), which defines driving while license revoked as driving on a public highway when one's license is revoked but exempts persons with driving permits issued by other states, the defense bears the burden to show that a valid driving permit has been issued by another State. The State is not required to prove the absence of a restricted driving permit from another state in order to establish the offense.

People v. Reher, 361 Ill.App.3d 697, 838 N.E.2d 206 (2d Dist. 2005) Defendant was prosecuted for violating an order of protection which, among other things, precluded him from "harass[ing] or having any kind of contact" with the protected persons. The evidence showed that the persons protected by the order lived directly across a highway from a K Mart store. As one of the protected persons was walking toward the K Mart one evening, she found defendant "fiddling" with his bicycle at the entrance to the store. Defendant testified that he had just made a purchase and was trying to attach the merchandise to his bike.

Because defendant was at the K Mart for a legitimate purpose, had no reason to know that the beneficiary of the order of protection would come to the store while he was there, and did not appear to have gone to the store in the hope or with the intention of seeing her, the evidence was insufficient to sustain the conviction.

People v. Williams, 376 Ill.App.3d 875, 876 N.E.2d 235 (1st Dist. 2007) Defendant was convicted of two counts of unlawful use of recorded sounds or images in violation of 720 ILCS 5/16-7(a)(2) and two counts of unlawful use of unidentified sound or audiovisual recordings in violation of 720 ILCS 5/16-8. The former statute prohibits the intentional, knowing or reckless transfer of sounds or images without the consent of the copyright owner, while the latter statute prohibits the intentional, knowing or reckless distribution of recorded material if the packaging fails to contain the actual name and address of the manufacturer and the names of the performers.

Defendant was allegedly engaged in the "street sale" of illegally-copied CD's and DVD's. At trial, an employee of the Recording Industry Association of America testified that he examined between 10 and 20 of the approximately 200 CD's seized from defendant. The expert concluded that the CD's he examined were illegal, counterfeit and "pirated" copies of actual CD's. He based this conclusion on the type and identifying marks on the media used for the recording, the fact that the artwork on the outside of the CD case had been photocopied and improperly cut, and the absence of the name and address of the manufacturer on the cover. The witness did not look at any of the DVD's that had been seized from defendant.

The convictions based on the sale of illegal music could stand. Although the CD's were not played in court or introduced into evidence, an expert in determining counterfeit CD's testified that his examination led him to conclude that the CD's contained sounds by artists who were covered by the major recording labels. Taking the evidence in the most favorable light for the State, there was a sufficient basis for a reasonable person to conclude that the CD's contained recorded sounds.

However, there was insufficient evidence to sustain the convictions based on the sale of illegal DVD's, because there was no evidence that the discs contained any images. The

expert did not examine the DVD's and offered no testimony concerning whether they contained illegal material. The only other testimony concerning the DVD's merely described the photocopied cover art of the case, not the DVD's themselves.

People v. Mocaby, 378 Ill.App.3d 1095, 882 N.E.2d 1162 (5th Dist. 2008) Convictions for unlawful delivery of a controlled substance containing diazepam and unlawful delivery of a controlled substance containing hydrocodeinone reversed. The evidence that the substance was diazepam was insufficient where the forensic scientist noted the markings on the tablets, looked up the markings in a publication, and concluded from that information that the tablets were diazepam. Likewise, the evidence that the other substance was hydrocodeinone was insufficient where the scientist looked them up in a publication and then "took the tablets and did analytical analysis." The scientist did not explain what sort of "analytical analysis" she performed. The testimony was too vague and speculative to sustain the convictions.

Smith v. U.S., ___ U.S. ___, 133 S.Ct. 714, ___ L. Ed.2d ___ (2013) (No. 11-8976, 1/9/13)

1. Although the prosecution has the burden to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, the constitution does not require that the prosecution disprove all affirmative defenses raised by the defense. Instead, the burden of proof may be assigned to the defendant if the affirmative defense in question does not negate an element of the crime. Although the legislative branch may choose to assign the burden of proof concerning other affirmative defenses to the prosecution, the constitution does not require it to do so.

2. Where a defendant was charged with conspiracy and claimed that he had withdrawn from the conspiracy at such time that the statute of limitations expired before the prosecution was brought, the constitution did not require that the prosecution bear the burden of disproving the affirmative defense of withdrawal. A withdrawal defense does not negate an element of conspiracy, but merely determines the point at which the defendant is no longer criminally responsible for acts which his co-conspirators took in furtherance of the conspiracy. Because the defense did not negate any elements of conspiracy, the constitution was not violated because Congress followed the common law rule by assigning to the defendant the burden to prove he had withdrawn from the conspiracy.

The court also noted the "informational asymmetry" between the defense and the prosecution concerning the defense of withdrawal. "The defendant knows what steps, if any, he took to dissociate from his associates," while it "would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened."

People v. Austin M., 2012 IL 111194 (No. 111194, 8/30/12)

In concurring opinions in a juvenile delinquency proceeding, Justices Freeman and Karmeier found that the State failed to meets its burden of proof in establishing the *corpus delicti* of the crime. *Corpus delicti* cannot be established solely based on the defendant's statement. Instead, the statement must be corroborated by independent evidence.

The concurring justices concluded that where the trial court specifically found that the only corroborating evidence offered by the State was not credible, the prosecution failed to carry its burden of proof to prove that a crime had occurred. Thus, the delinquency adjudication should be reversed outright.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Lara, 2012 IL 112370 (No. 112370, 10/18/12)

1. Under Illinois law, proof of an offense requires that the State prove two propositions beyond a reasonable doubt: (1) that a crime occurred (*i.e.*, the *corpus delicti*); and (2) that the crime was committed by the person charged. Although the defendant's confession may be considered in proving *corpus delicti*, it cannot be the only evidence of *corpus delicti*. Thus, where the defendant's statement is used to prove *corpus delicti*, the prosecution must produce independent evidence which corroborates the statement.

The corroborating evidence need not, in and of itself, prove the existence of a crime beyond a reasonable doubt. Instead, the independent corroborating evidence need only tend to show that a crime occurred. At that point, the independent evidence and the defendant's confession are considered together to determine whether the State has sufficiently established the *corpus delicti* to support a conviction.

The *corpus delicti* rule arose from historical mistrust of out-of-court confessions, due to concerns that some individuals may confess to crimes they did not commit or which did not occur and that a confession may have been coerced and is therefore not reliable.

2. In **People v. Sargent**, 239 Ill. 2d 166, 940 N.E.2d 1045 (2010), the Supreme Court held that the corroborating evidence must relate to the specific events on which the prosecution is predicated. Under **Sargent**, if a defendant confesses to multiple offenses there must be independent evidence tending to show that the defendant committed each offense.

Here, the court found that the **Sargent** rule does not apply to all situations involving multiple offenses, but only to the situation that was present in **Sargent**, where the offenses in question alleged distinctly different criminal acts (predatory criminal sexual assault based on digital penetration and aggravated criminal sexual abuse based on fondling). Under the **Sargent** rule, evidence which established digital penetration could not be used to corroborate the offense involving fondling, because the latter crime concerned "an entirely different type of assault affecting a different part of the victim's body."

Here, by contrast, defendant was charged with two counts of predatory criminal sexual assault of a child involving the same type of conduct and the same area of the complainant's body, but occurring on different days. The court concluded that the same evidence may corroborate a confession to multiple offenses where the offenses are so closely related that corroboration of one tends to corroborate the other. Whether the corroborating evidence is sufficient to establish multiple offenses is a fact-intensive inquiry which must be decided on a case-by-case basis.

3. The court rejected the defendant's argument that as part of the *corpus delicti* rule, corroboration is required for each element of each alleged offense. So long as there is evidence tending to show that an offense occurred, the defendant's confession is to be considered along with the independent corroborating evidence to determine whether the *corpus delicti* rule has been satisfied.

Furthermore, there need not be an exact match between the independent evidence and the details of the defendant's confession. Instead, the corroboration is sufficient if the evidence and its reasonable inferences tend to show the commission of a crime that is "at least closely related to the charged offense." Thus, even if the confession involves an element of the crime, the independent evidence need not specifically corroborate that element so long as the corroborating evidence "corresponds" with the confession.

4. Where the defendant was charged with penetrating the complainant's vagina with his finger on two occasions, and stated in his confession that he had done so, the *corpus delicti*

rule was satisfied although in her out-of-court statements and testimony the complainant stated only that the defendant had touched her "private part," without stating that penetration had occurred. Under these circumstances, the corroborating evidence (the complainant's statements and testimony) generally corresponded with the defendant's confession. Thus, the *corpus delicti* rule was satisfied although other than the defendant's confession there was no evidence of penetration.

The Appellate Court's judgment was reversed, and the defendant's convictions and sentences were reinstated. However, the cause was remanded for the Appellate Court to reach two issues it had not previously considered.

In a concurring opinion, Justice Thomas argued that **People v. Sargent** was wrongly decided and should be overruled.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Lloyd, 2013 IL 113510 (No. 113510, 4/18/13)

The court reversed several criminal sexual assault convictions after finding that the record was completely devoid of any evidence to support a finding that defendant knew the victim was unable to understand the nature of the acts or give knowing consent. Although the State presented evidence from which a rational trier of fact could have concluded that defendant committed aggravated criminal sexual abuse, it chose not to charge that offense. In the course of its opinion, the court stated that in evaluating a defendant's challenge to the sufficiency of the evidence "we can only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact that he may be guilty of [an] uncharged offense . . ." that is not a lesser included crime.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Sargent, 239 Ill.2d 166, 940 N.E.2d 1045 (2010)

1. Under Illinois law, proof of an offense requires evidence of two distinct propositions beyond a reasonable doubt: (1) that a crime occurred (i.e., the *corpus delicti*); and (2) that the crime was committed by the person charged. A defendant's confession may be integral to proving *corpus delicti*. However, *corpus delicti* may not be proven exclusively by a defendant's extrajudicial confession or statement. Thus, where the defendant's statement is used to prove *corpus delicti*, the prosecution must also produce independent evidence which corroborates the statement.

The corroborating evidence need not, in and of itself, prove the existence of a crime beyond a reasonable doubt. Instead, the corroborating evidence and the defendant's statement are considered together to determine whether the crime, and the fact that defendant committed it, are proven.

The court also stressed that statements which merely corroborate the circumstances related in the confession, without showing that a crime occurred, are insufficient to satisfy the *corpus delicti* requirement. Instead, the corroborating evidence must relate to the specific events on which the prosecution is predicated. Thus, where a defendant confesses to multiple offenses, there must be independent evidence tending to show that the defendant committed each of the offenses.

2. The court concluded that there was insufficient evidence to satisfy the *corpus delicti* rule concerning two convictions for aggravated criminal sexual abuse and two counts of predatory criminal sexual assault.

A. The counts of aggravated criminal sexual abuse were based on allegations that defendant fondled the penis of one of his stepsons. The court noted that other than

defendant's confession - which he repudiated at trial - there was no evidence that defendant had ever touched the stepson's penis. Thus, the two counts of aggravated criminal sexual abuse were vacated.

B. Defendant was also charged with two counts of predatory criminal sexual assault based on penetrating the stepson's anus with his finger; the court concluded that the *corpus delicti* was satisfied only concerning one count.

At trial, the stepson testified that he could not remember whether defendant had ever done anything to him that he did not like. The sole corroboration of defendant's confession consisted of hearsay testimony from a DCFS investigator, who testified that the stepson told him that the defendant "puts [his] finger in the [stepson's] butt." The court concluded that the statement, which was admitted under 725 ILCS 5/115-10, could support only a single count of predatory criminal sexual assault.

The court rejected the argument that use of the term "puts" indicated that the conduct occurred multiple times. First, the court found that adding an "s" to a verb does not indicate a plural form.

Furthermore, while the word "puts" could be interpreted as indicating habitual action, it cannot be assumed that the language skills of a seven-year-old child are susceptible to such a precise interpretation. Finally, because the investigator described the statement differently in a pretrial hearing, it could not be assumed that he was accurately describing the declarant's exact language.

Because the *corpus delicti* rule was satisfied only for one count of predatory criminal sexual assault, two counts of predatory criminal sexual assault were reversed.

3. The court rejected the State's argument that it should abandon the *corpus delicti* rule.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

In re Gregory G., ___ Ill.App.3d ___, 920 N.E.2d 1096 (2d Dist. 2009) (No. 2-08-0120, 12/9/09)

The court found that there is an irreconcilable split of Illinois Supreme Court authority concerning whether the three-part test of **People v. Housby**, 84 Ill.2d 415, 420 N.E.2d 151 (1981) applies to all inferences from circumstantial evidence, or only to the inference from possession of recently stolen property. The court declined to resolve the split of authority here, finding that under both **Housby** and the "rational trier of fact" standard, the evidence was insufficient to convict defendant of battery for striking a security guard over the head with a bottle.

The evidence consisted of the following: (1) the guard was struck by a bottle that was held, not thrown; (2) the bottle broke; (3) a group of 100 people were in the vicinity; (4) several other members of the crowd carried beer bottles; and (5) two minutes after the incident, the guard saw defendant holding a broken bottle. The court concluded that it was unreasonable to infer from such evidence that defendant was the person who struck the guard.

Defendant's delinquency of adjudication was reversed.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

In re S.M., 2014 IL App (3d) 140687 (No. 3-14-0687, 2/4/15)

1. Defendant was charged in juvenile court with unlawful possession of a concealable handgun by a person under 18 years of age. 720 ILCS 5/24-3.1(a)(1). The State did not present any evidence establishing defendant's age, which was an element of the offense. During closing argument, defendant pointed out this failure, and in rebuttal the State asked the trial court to take judicial notice of the court record showing that the court's juvenile jurisdiction attached

for minors under 18 years of age. The trial court agreed with the State, finding that as a matter of jurisdiction defendant was under 18, otherwise he would have been tried in adult court.

2. The Appellate Court reversed defendant's adjudication, holding that the State failed to prove defendant was under 18, an element of the offense, and that the trial court could not properly fill in that missing proof by taking judicial notice of defendant's age.

Illinois Rule of Evidence 201 allows a trial court to take judicial notice of certain facts which are not subject to reasonable dispute, meaning they are generally known in the local population or are capable of accurate and ready determination by consulting sources of unquestioned accuracy. A court may take judicial notice of its own records, including the status of pleadings in a juvenile proceeding.

3. The State charged defendant in juvenile court, which has exclusive jurisdiction to adjudicate criminal offenses committed by minors under the age of 18, and defendant did not file a motion to dismiss the charges. But procedural silence regarding allegations in a charging document cannot be construed as a judicial admission to an element of the offense. The failure of defendant to contest specific allegations in the charge did not absolve the State of its obligation to prove the elements of an offense.

Additionally, defendant's age was not technically a jurisdictional requirement since juvenile court is simply a division of the circuit court. Defendant's silence with respect to jurisdiction thus did not constitute an admission that he was under 18 at the time of the offense.

4. The Appellate Court rejected the State's argument, made for the first time on appeal, that the trial court could fill in the State's missing proof by taking judicial notice of defendant's unsworn statement during arraignment that he was 16 years old. Not only was the statement unsworn, it was also self-incriminating, since defendant gave the answer in response to a direct question from the court about his age, an element of the offense. If this statement could be considered on appeal to provide the necessary proof of age, it would prevent defendant from any meaningful opportunity to challenge this element at trial, or to challenge the admission of his statement as violating his right against self-incrimination.

5. The Appellate Court also held that the trial court could not take judicial notice of an adjudicative fact without first reopening the evidentiary portion of the trial. Here, defendant pointed out the missing proof during its closing argument. The State was not entitled to have a "do-over" by asking the court in its rebuttal argument to supplement the completed evidence pursuant to judicial notice.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Lucas Walker, Ottawa.)

People v. Brooks, 2012 IL App (4th) 100929 (No. 4-10-0929, 3/7/12)

Violation of an order of protection is a Class 4 felony if the defendant has a prior conviction for unlawful restraint. 720 ILCS 5/12-30(d). Where the prosecution intends to seek an enhanced sentence based on a prior conviction, it is required to notify the defendant of such intention in the charging instrument. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted. . . ." 725 ILCS 5/111-3(c).

Defendant was properly convicted of the Class 4 felony of violating an order of protection based on a prior unlawful conviction for unlawful restraint. The State properly disclosed its intent to seek the enhancement based on that conviction in the indictment. The trial court took judicial notice of the conviction outside the presence of the jury.

The court rejected defendant's reliance on **People v. Palmer**, 104 Ill.2d 340, 472 N.E.2d 795 (1984), as support for the argument that the unlawful restraint conviction was an element of the offense that had to be proved to the jury. **Palmer** was decided prior to the legislature's enactment of 725 ILCS 5/111-3(c).

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Davis, 2016 IL App (1st) 142414 (No. 1-14-2414, 6/17/16)

The State failed to prove that the delivery of controlled substances occurred within 1000 feet of a school. 720 ILCS 570/407(b)(2). The evidence showed that defendant sold heroin to an undercover officer at an alley behind a gas station. The parties stipulated that an investigator measured the distance from the gas station to a high school as 822 feet. There was no evidence as to precisely where in the alley the sale took place or where in the gas station the investigator made his measurement from.

The court held that in order to establish that a drug transaction took place within 1000 feet of a school, the State must present evidence of the distance from the actual site of the transaction to the school. Here the evidence failed to show where precisely the transaction took place in the alley. And there was no evidence where precisely in the gas station the technician took his measurements. The State thus did not meet its burden.

Although the investigator's evidence was presented by stipulation, that did not remedy the shortcomings in the proof. Stipulations are given their natural probative effect and do not include matters that are not necessarily implicated by the stipulation. Here the stipulation only showed that the measurement took place from some point in the gas station and did not show that the measurement was from the actual site of the transaction in the alley behind the station.

The court reduced the conviction to delivery of a controlled substance and remanded for resentencing.

People v. Gharrett, 2016 IL App (4th) 140315 (No. 4-14-0315, 4/27/16)

1. When reviewing a challenge to the sufficiency of the evidence, the reviewing court determines whether, considering the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The trier of fact is in the best position to judge the credibility of witnesses, and the reviewing court must follow any reasonable inferences from the record which favor the prosecution. A conviction will be reversed only when the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt.

2. 720 ILCS 5/12C-30(b)(i) provides that a person who is 21 or older commits the offense of contributing to the criminal delinquency of a minor where, with intent to promote or facilitate the commission of an offense, he or she solicits, compels or directs a minor who is under the age of 17 in the commission of a felony. The court concluded that video evidence did not establish that the defendant told a two-year-old child to run into an office from which items were subsequently found to be missing where the video showed only that defendant leaned toward the child before she ran into the office.

The court noted that the child had previously wandered around the building, which was a Secretary of State facility, without any prompting from the defendant. In fact, the child "seemed to defy any commands to stay near" her parents. Under these circumstances, the evidence was insufficient to prove beyond a reasonable doubt that the child ran to the office area at defendant's direction.

Defendant's conviction for contributing to the criminal delinquency of a minor was

reversed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Harris, 2012 IL App (1st) 100077 (No. 1-10-0077, 2/28/12)

1. Proof of an offense requires evidence of two distinct propositions beyond a reasonable doubt: (1) that a crime occurred (i.e., the *corpus delicti*); and (2) that the crime was committed by the person charged. Proof of the *corpus delicti* may not rest solely on a defendant's statement or confession. If a defendant's statement is part of the *corpus delicti*, the State must also present independent evidence which corroborates the statement. Such evidence itself need not prove the crime beyond a reasonable doubt, but must tend to confirm the elements of the defendant's statement.

2. The court concluded that there was insufficient evidence to corroborate defendant's statement concerning the *corpus delicti* of aggravated unlawful use of a weapon. Defendant was charged with having a loaded, uncased firearm "on or about his person" while on a public street. Defendant told police that after a friend was struck by gunshots, defendant retrieved his weapon from his car and returned fire. The only evidence to corroborate that statement was testimony by a police officer that an anonymous eyewitness reported that he saw the defendant run to his car, get a black object, and then return the black object to the car after the shooting.

The Appellate Court concluded that an anonymous eyewitness's hearsay statement is insufficient to corroborate a defendant's statement for the purposes of proving *corpus delicti*. Although the hearsay statement was produced without objection, "the probative effect of a statement given to police by an anonymous witness is minimal without evidence corroborating the witness's information."

The court distinguished **People v. Anderson**, 42 Ill.App.3d 1040, 356 N.E.2d 1076 (1st Dist. 1976), where the corroborating evidence consisted of hearsay concerning statements which the victim made in the defendant's presence at the time of the arrest. Here, the corroboration came from an unnamed witness rather than a known victim, and the accusations were not made in the defendant's presence.

Defendant's conviction for aggravated unlawful use of a weapon was reversed.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Hurry, 2012 IL App (3d) 100150 (No. 3-10-0150, modified 4/20/12)

Illinois law requires proof of two distinct propositions beyond a reasonable doubt to convict: (1) that a crime occurred, *i.e.* the *corpus delicti*; and (2) that the crime was committed by the person charged. While defendant's confession may be integral to proving the *corpus delicti*, proof of the *corpus delicti* may not rest exclusively on the defendant's extrajudicial statement.

The *corpus delicti* is not required to be proved beyond a reasonable doubt by evidence independent of the statement. If there is evidence of corroborating circumstances tending to prove the *corpus delicti* and corresponding with the circumstances related in the statement, both the circumstances and the statement may be considered in determining whether the *corpus delicti* is sufficiently proved.

The independent corroborating evidence, however, must relate to the specific events on which the prosecution is predicated. Where defendant confesses to multiple offenses, the corroboration rule requires that there be independent evidence tending to show that defendant committed each of the offenses for which he was convicted.

1. Defendant was convicted of predatory criminal sexual assault for placing his finger

in the vagina of a child. Defendant admitted committing that act of penetration. The child's testimony that defendant touched her on the outside of her vagina provided corroborating circumstances that tended to prove defendant's statement was accurate because it placed defendant's fingers directly on her vagina.

2. Other counts charged defendant with predatory criminal sexual assault by placing his penis in the mouth of the child. Although defendant admitted committing this act on multiple occasions, the child's testimony established only one instance of such conduct. Therefore, only one conviction based on that conduct could stand.

3. The child did testify, however, that on two occasions defendant made her touch his penis with her hand. Based on that evidence, the court reduced two of defendant's predatory criminal sexual assault convictions to aggravated criminal sexual abuse. 720 ILCS 5/12-16.

4. Remand for resentencing is not required where a reviewing court vacates some of defendant's convictions if: (1) the circuit court sentenced defendant separately on each conviction; and (2) the record does not otherwise show that the court considered the vacated convictions in imposing sentence on the remaining convictions.

The court concluded that resentencing was not required even though it vacated four of defendant's convictions. The circuit court sentenced defendant separately on each conviction. In discussing factors in aggravation, the court simply stated that each individual act, not a combination of all of the acts, threatened physical harm. Therefore, the court did not consider the vacated convictions when it sentenced defendant on the convictions that were affirmed.

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

People v. Hurry, 2013 IL App (3d) 100150-B (No. 3-10-0150, Mod. Op. 1/16/14)

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(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

People v. Johnson, 2014 IL App (1st) 122459-B (No. 1-12-2459, 12/31/14)

Under 720 ILCS 5/5-2(c) a person is accountable for the conduct of another if "either before or during the commission of an offense, with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Accountability cannot be established by merely showing that the defendant knew of or consented to the commission of the offense. It also cannot be established by defendant's mere presence at the scene of the crime even if coupled with defendant's flight from the scene or his knowledge that a crime has occurred.

Here, the State's evidence showed that defendant was driving a car with his co-defendant as a passenger. At some point, co-defendant saw a man named Brandon driving another vehicle. Co-defendant identified Brandon as the "dude that shot me," and told defendant to chase him. Defendant pursued the other car and eventually stopped in front of it. Co-defendant got out of the car, pulled out a gun, and fired several shots at Brandon. Brandon tried to dive away and in the process struck defendant's car. Defendant drove down the street and while co-defendant was still firing the gun, told him to "come on or I'm going to leave you." Co-defendant ran towards defendant's car still firing his gun. Co-defendant got back in the car and defendant drove away. Brandon eventually died from the gunshots. Defendant later told an acquaintance that co-defendant had been armed, and they had "made a move" on (meaning shot) a man in another vehicle.

The Appellate Court held that this evidence failed to prove that defendant was guilty by accountability for first degree murder. Even though he drove the co-defendant to the scene of the crime and then helped him escape, there was no evidence that defendant had a prior intent to facilitate the shooting since defendant did not know the victim would be shot before the offense occurred, nor even that the co-defendant was armed. Driving someone away from the scene of the crime does not establish accountability. Nor does presence at the crime scene coupled with knowledge that a crime has occurred and subsequent flight. And there can be no common design to shoot someone if the defendant does not know his co-defendant is armed.

The fact that co-defendant identified Brandon as the man who shot him does not prove that defendant intended to help him shoot Brandon. And even though co-defendant instructed defendant to chase Brandon, there was no evidence as to why co-defendant asked him to do this. Defendants statement to an acquaintance that co-defendant was armed and they "made a move" on Brandon were merely after-the-fact accounts of the events and do not establish what defendant's intent was prior to the shooting. They also do not show when defendant learned that co-defendant was armed. As a result, the Appellate Court concluded that the State failed to prove beyond a reasonable doubt that defendant intended to facilitate the murder either before or during the shooting. The court therefore reversed defendant's first degree murder conviction.

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The Appellate Court held that this evidence failed to prove that defendant was guilty by accountability for first degree murder. Even though he drove the co-defendant to the scene of the crime and then helped him escape, there was no evidence that defendant was involved in any advanced planning or had a prior intent to facilitate the shooting since defendant did not even know the co-defendant before he entered the car, let alone that he was armed and intended to shoot someone.

There was also no evidence that defendant participated in a common criminal design since defendant did nothing to assist the co-defendant during the crime. Driving someone away from the scene of the crime does not establish accountability. Nor does presence at the crime scene coupled with knowledge that a crime has occurred and subsequent flight.

The fact that co-defendant identified Brandon as the man who shot him does not prove that defendant intended to help him shoot Brandon. And even though co-defendant instructed defendant to chase Brandon, there was no evidence as to why co-defendant asked him to do this. Defendant's statement to an acquaintance that co-defendant was armed and they "made a move" on Brandon were merely after-the-fact accounts of the events and do not establish what defendant's intent was prior to the shooting. They also do not show when defendant learned that co-defendant was armed. As a result, the Appellate Court concluded that the State failed to prove beyond a reasonable doubt that defendant intended to facilitate the murder either before or during the shooting. The court therefore reversed defendant's first degree murder conviction.

People v. Lara, 408 Ill.App.3d 732, 946 N.E.2d 516 (1st Dist. 2011)

1. Under Illinois precedent, *corpus delicti* may not rest exclusively on the defendant's extrajudicial confession, admission, or other statement. Thus, a conviction will lie only if the defendant's statement is corroborated by independent evidence relating to the specific events on which the prosecution is predicated. For convictions to be entered, there must be evidence tending to show that defendant committed each of the offenses for which he was convicted.

There was insufficient independent corroboration of defendant's confession to permit convictions for predatory criminal sexual assault to stand. Predatory criminal sexual assault

requires a showing of "sexual penetration," which is defined as "any intrusion, however slight, of any part of the body of one person" into the sex organ of another person. Defendant told police that on two separate occasions, he inserted his finger into the complainant's vagina. The complainant confirmed the incidents, but claimed that the defendant's hand stayed outside her vagina both times. Thus, the only evidence of penetration came from the defendant's statement.

The court stated that defendant's "guilty conscience, weighed down with the recognition that he had abused a position of trust, may have led [the defendant] to overstate his guilt, or pressure from [the complainant's mother] and the police may have led [the defendant] to add an untrue detail to his confession." Thus, the "historical reasons for mistrusting confessions fully apply to the element that changes these crimes from Class 2 felonies . . . to Class X felonies."

The Appellate Court rejected the holding of **People v. Salinas**, 347 Ill.App.3d 867, 807 N.E.2d 1178 (1st Dist. 2004), which held that the independent evidence must corroborate only that a crime occurred and need not support the crime for which the defendant was convicted. The court concluded that **Salinas** cannot be reconciled with the Supreme Court's opinion in **People v. Sargent**, 239 Ill.2d 166, 940 N.E.2d 1045 (2010).

2. The court concluded, however, that in view of the complainant's testimony there was sufficient corroboration to justify convictions for the lesser included offense of aggravated criminal sexual abuse. That offense requires an act of "sexual conduct" by a defendant who is over the age of 17 against a complainant who is under the age of 13. "Sexual conduct" includes any contact between a defendant's finger and the complainant's vagina for the purpose of sexual gratification. In view of the complainant's claim that the defendant's hand stayed outside her vagina on both occasions, the convictions were reduced to aggravated criminal sexual abuse.

3. In a special concurrence, Justice Murphy concluded that **Sargent** and **Salinas** may be reconciled and that corroborating evidence which tends to show that the crime was committed satisfies the corroboration rule even if each element of the crime is not corroborated. Justice Murphy found that the holding of this case should be limited to situations in which the complainant's testimony specifically denies an element of the crime.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Lattimore, 2011 IL App (1st) 093238 (No. 1-09-3238, 9/2/11)

1. The State must prove the essential elements of the charging instrument. For a variance between the charging instrument and the proof at trial to be fatal, the difference must be material and of such a character as may mislead the defendant in making his defense, or expose the defendant to double jeopardy.

Defendant was charged with aggravated battery, a violation of 720 ILCS 5/12-4(b)(15), in that he "struck James Lee about the body, knowing him to be a merchant, to wit: an employee of Family Dollar Store, who was detaining James Lattimore for an alleged commission of retain theft." Section 12-4(b)(15) makes it unlawful to knowingly and without lawful justification and by any means cause bodily harm to a merchant who detains a person for an alleged commission of retail theft.

Rather than proving that defendant struck Lee about the body as alleged in the indictment, the State proved that he caused Lee to be struck about the body when he struggled with Lee, causing Lee to suffer bodily harm when he was thrown into an object. Because the crime of aggravated battery can be committed by several different acts, a variance between the act charged in the indictment and the act proved at trial is not fatal. The difference

between whether defendant struck Lee about the body or caused Lee to be struck about the body relates only to the manner in which defendant caused bodily harm to Lee. Defendant did not demonstrate that the variance between pleading and proof was material, such that it affected the adequacy of the notice of the charge or exposed defendant to double jeopardy.

Similarly, even though the indictment alleged that Lee was an employee of the store, and the evidence proved that he was an employee of a security agency, the variance was not fatal. Defendant has not shown how this difference misled him in preparation of his defense or exposed him to double jeopardy.

2. A "merchant" for purposes of 720 ILCS 5/12/4(b)(15) is defined as "an owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee or independent contractor of such owner or operator." 720 ILCS 5/12-4(b)(15); 720 ILCS 5/16A-2.4. An "independent contractor," as opposed to an employee, undertakes to produce a certain result but is not controlled as to the method by which he obtains the result.

The court found the evidence sufficient to prove that Lee acted as an independent contractor as he was employed by a security agency, wore clothing identifying him as a security guard, was assigned to the store where the theft occurred by his employer, and acted pursuant to notice by the store management that defendant attempted to leave the store without paying for merchandise. However, whether Lee was an employee or an independent contractor is immaterial because in either instance, he qualifies as a "merchant" under the statute.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. McPeak, 2012 IL App (2d) 110557 (No. 2-11-0557, 11/2/12)

1. The State bears the burden of proving all elements of the offense beyond a reasonable doubt. Where a statutory exception to an offense is "part of the body of the substantive offense," the State's burden includes disproving the exception beyond a reasonable doubt. Even where an exception appears within the statutory definition of an offense, however, it is "part of the body" of the offense only if it is "so incorporated with the language of the definition that the elements of the offense cannot be accurately described without reference to the exception."

By contrast, a statutory exception which merely withdraws certain acts or persons from the operation of the statute is not part of the body of the offense. The defense has the burden of proof concerning such exceptions.

2. 625 ILCS 5/6-303(a) defines the offense of driving with a suspended or revoked license as driving or being in actual physical control over a motor vehicle while one's license is revoked or suspended, "except as may be specifically allowed by" statutes authorizing a "monitoring device driving permit," which authorizes the offender to drive upon installation of a device which prevents the vehicle from starting if the driver's breath alcohol exceeds a specified level. The Secretary of State must issue such a permit to first offenders unless the offender declines.

The court concluded that the MDDP provision merely withdraws drivers who receive an MDDP from the scope of the statute defining the offense of driving with a revoked or suspended license, and that the provision is therefore not part of the body of the offense. Thus, the State need not present evidence affirmatively showing that the defendant was not granted an MDDP. Because the defendant did not raise as a defense that she had been issued and was driving in compliance with an MDDP, the State met its burden of proof concerning the offense despite its failure to present evidence whether defendant had been granted an MDDP.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Smith, 2015 IL App (1st) 122306 (No. 1-12-2306, modified upon denial of rehearing 11/13/15)

The improper admission of evidence does not automatically require an outright reversal, even if the evidence would have been insufficient to convict if the erroneously admitted evidence was not considered. Remand for a new trial is the appropriate remedy where all the evidence at trial, including the improperly admitted evidence, viewed in the light most favorable to the State, is sufficient to allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt.

Here, the State failed to properly establish that the breathalyzer machine was certified as accurate within 62 days of defendant's test, and thus the breathalyzer test results (showing that defendant's alcohol concentration exceeded .08) were improperly admitted. The court rejected defendant's request for an outright reversal of his conviction. Instead, the court held that the proper remedy in this case was to reverse and remand for a new trial, since the evidence, including the improperly admitted breath test, was sufficient to prove defendant guilty of driving with an alcohol concentration of .08 or more.

(Defendant was represented by Assistant Defender Mike Gomez, Chicago.)

People v. Sykes, 2012 IL App (4th) 111110 (No. 4-11-1110, 7/31/12)

To prove that a crime was committed beyond a reasonable doubt, the State must prove: (1) a crime occurred, *i.e.*, the *corpus delicti*, and (2) the crime was committed by the defendant. Theft requires proof that the defendant obtained unauthorized control over the property of another with intent to permanently deprive the owner of the use or benefit of the property. 720 ILCS 5/16-1(a).

Defendant was convicted of misdemeanor theft for removing $100 from a cash register of a store where he was an employee. To prove that a theft occurred, a loss prevention manager testified that it was store policy to leave $200 in the register overnight as a starting fund for the next day during the holiday season and on busy days, but he had no knowledge that the register actually started with $200 and did not testify that the policy was consistently followed. He also testified that he "became aware" that the register was $100 short, but no evidence was introduced to show how this discrepancy was brought to his attention or that it was verified. The only remaining evidence was a videotape that was of such poor quality that it failed to demonstrate that defendant actually removed anything from the register.

The Appellate Court reversed defendant's conviction because the State failed to prove that the store was missing property over which defendant could have exercised unauthorized control.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Thomas, 2014 IL App (2d) 121203 (No. 2-12-1203, 8/5/14)

The failure to correctly instruct the jury on the State's burden to prove defendant guilty beyond a reasonable doubt is a violation of due process. The proper inquiry is not whether the jury could have applied a particular instruction in an unconstitutional manner, but whether there is a reasonable likelihood that the jury actually applied the instruction improperly.

The United States Supreme Court has held that as a matter of federal constitutional law a trial court is neither prohibited from nor required to define reasonable doubt. Under Illinois law, however, courts are discouraged from defining reasonable doubt for a jury. There is no recommended jury instruction providing such a definition, and the committee notes recommend that courts give no instruction defining the term.

But defining reasonable doubt does not necessarily constitute reversible error. Instead,

the question is whether the instructions taken as a whole created a reasonable likelihood that the jury believed it could convict under a lesser standard than reasonable doubt.

Here, the trial court answered the jurors' request for the legal definition of reasonable doubt by telling them that "it is for you to decide." The Appellate Court held that this response was "unquestionably correct." The court did not attempt to define reasonable doubt for the jury. Instead, it left the jurors to wrestle with its meaning themselves, which is in keeping with our legal system's confidence that jurors will act diligently and thoughtfully in applying the law. "[A]bsent any concrete demonstration of error or confusion, jurors should be trusted to apply the reasonable doubt standard appropriately."

The court disagreed with the decisions in **People v. Thurman**, 2011 IL App (1st) 0911019 and **People v. Franklin**, 2012 IL App (3d) 100618, to the extent that they held that simply instructing jurors that they must determine for themselves the meaning of reasonable doubt is *per se* reversible error.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Vaughn, 2011 IL App (1st) 092834 (No. 1-09-2834, 11/23/11)

The State must prove the *corpus delicti* of an offense beyond a reasonable doubt. *Corpus delicti* cannot be proved by defendant's confession alone. There must be some evidence independent of the confession tending to show that the crime did occur, but that independent evidence need not by itself prove the existence of the crime beyond a reasonable doubt. This corroboration requirement exists due to a general mistrust of extrajudicial statements, which may be unreliable. This mistrust does not extend to in-court testimony.

The defendant's own in-court testimony on cross-examination admitting that he committed an act of penetration provided sufficient corroboration for his confession to that act of penetration. Any confusion on defendant's part could have been cleared up on redirect examination, but none was conducted.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

Top

§42-2
Function of Trier of Fact – Believing or Disregarding Testimony

People v. Sanchez, 115 Ill.2d 238, 503 N.E.2d 277 (1986) It is the function of the jury, as trier of fact, to determine the credibility of witnesses and resolve any conflicts or inconsistencies in the evidence. It is not the function of the reviewing court "to retry the defendant."

People v. Akis, 63 Ill.2d 296, 347 N.E.2d 733 (1976) It is the function of the trier of fact to determine the credibility of witnesses, the weight to be given their testimony and the inferences to be drawn from the evidence. Where the evidence is merely conflicting, a court of review will not substitute its judgment for that of the trier of fact.

People v. Novotny, 41 Ill.2d 401, 244 N.E.2d 182 (1969) The testimony of one witness, if positive and credible, is sufficient to convict even if contradicted by the accused. It is not the duty or privilege of a reviewing court to substitute its judgment of weight or credibility for that

of the trier of fact, which heard the evidence and observed the demeanor of the witnesses.

People v. Locascio, 106 Ill.2d 529, 478 N.E.2d 1358 (1985) Determining the credibility of witnesses and weight of testimony is primarily for the trier of fact. The "trier of fact may disregard exculpatory accounts or other evidence that tends to support or be consistent with a defendant's innocence and rest its decision instead on the circumstantial evidence of guilt presented by the State."

People v. McGee, 21 Ill.2d 440, 173 N.E.2d 434 (1961) Evidence of alibi cannot be disregarded where the sole evidence contradicting it rests on a less than positive identification of defendant.

People v. Setzke, 22 Ill.2d 582, 177 N.E.2d 168 (1961) The trier of fact is not required to believe alibi testimony over a positive identification, even though the alibi testimony came from a greater number of witnesses.

People ex rel. Brown v. Baker, 88 Ill.2d 81, 430 N.E.2d 1126 (1981) The credibility of witnesses and the weight to be given their testimony are typically jury considerations; however, a jury cannot arbitrarily or capriciously reject the testimony of an unimpeached witness. "Where the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded even by a jury." See also, **People v. Tomasello**, 166 Ill.App.3d 684, 520 N.E.2d 1134 (2d Dist. 1988) (jury could not disregard defendant's unimpeached and uncontradicted testimony).

People v. Holsapple, 30 Ill.App.3d 976, 333 N.E.2d 683 (5th Dist. 1975) The jury was justified in disregarding defendant's alibi testimony because it was "just not believable." However, "an incredible explanation denying guilt is not an admission of guilt — even though it may not aid the defendant, it does not supplement the proof required of the State." See also, **People v. Kinsloe**, 281 Ill.App.3d 799, 666 N.E.2d 872 (1st Dist. 1996) (defense witness's incredible testimony exonerating defendant does not justify inference that defendant must have been guilty).

People v. Weeks, 115 Ill.App.3d 524, 450 N.E.2d 1351 (2d Dist. 1983) Testimony cannot be disregarded where it is not contradicted by other witnesses or by the circumstances and is not inherently improbable, and where the witness has not been impeached.

People v. Harling, 29 Ill.App.3d 1053, 331 N.E.2d 653 (1st Dist. 1975) Defendant's conviction for voluntary manslaughter following a bench trial was reversed. Defendant's claim of self-defense was in part corroborated by eyewitnesses, and defendant's testimony was not incredible or improbable. "A trier of fact should not disregard or reject testimony by defendant which is not improbable or contradicted in its material parts, especially where it is corroborated at least in part."

People v. Shaw, 63 Ill.App.3d 227, 379 N.E.2d 949 (4th Dist. 1978) The police came to defendant's residence about midnight and said they had arrest warrants for defendant's brothers. Defendant made a "quick look" through her house, and told police that her brothers were not there. She then consented to a search of the premises. The police subsequently

found the brothers in the basement.

Any inferences which reasonably show that defendant had the intent to prevent her brothers' apprehension conflicted with her voluntary consent to the search. Conviction for obstructing justice reversed.

People v. Flores, 41 Ill.App.3d 96, 353 N.E.2d 131 (1st Dist. 1976) Defendant's conviction for DUI was reversed; defendant's uncontradicted and unimpeached testimony (that he drank *after* the accident) was substantiated by another witness.

People v. Cortez, 26 Ill.App.3d 829, 326 N.E.2d 232 (1st Dist. 1975) Defendant's conviction for shoplifting was reversed. Defendant was stopped near the store exit (past the checkout counters) and was wearing a heavy jacket with price tags hanging from the sleeve. Defendant testified that he was looking for his friend, from whom he was going to borrow money to buy the coat.

State failed to contradict defendant's innocent explanation. The trial judge erred by rejecting defendant's explanation simply by concluding that defendant's testimony was incredible. "Evidence given in court under oath may not be simply disregarded where it is neither contradicted nor impeached nor inherently improbable."

People v. Szymanowski, 182 Ill.App.3d 885, 538 N.E.2d 729 (1st Dist. 1989) The circumstantial evidence upon which defendant's guilt was premised was directly contrary to the victim's testimony, who testified that defendant was not her attacker. The victim's testimony was not impeached or directly contradicted. Because the victim's testimony established that a third party beat her, the evidence was insufficient to sustain defendant's guilt beyond a reasonable doubt despite defendant's statement that he struck the victim.

Cumulative Digest Case Summaries **§42-2**

In re Nasie M., 2015 IL App (1st) 151678 (No. 1-15-1678, 12/1/15)

1. When a defendant challenges the sufficiency of the evidence, the reviewing court must decide whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Generally, the trier of fact is in the best position to judge credibility and it is not the function of the reviewing court to retry the case. A finding of guilt will only be reversed where the proof was so improbable, implausible, or unsatisfactory that reasonable doubt exists.

2. Following a bench trial, defendant was convicted of several gun offenses, all of which required proof that he possessed a gun. The State's evidence showed that the police spoke with defendant at a vacant lot where he had been shot in the foot. Defendant was taken to the hospital and the police went to his girlfriend's apartment, where they found a gun under a mattress. The gun contained a live, unfired cartridge.

An officer interviewed defendant at the hospital where he was being treated and was on pain medication. Defendant initially told the officer that he had been shot by two assailants who were behind him. The officer observed that the wound was to the top of defendant's foot and questioned defendant's version of events. He also told defendant that a gun had been recovered from his girlfriend's house. Defendant then admitted the gun was his. He told the officer that he had been carrying the gun, accidentally shot himself in the foot and then took the gun back to his girlfriend's house.

Defendant, by contrast, testified that two men fired several shots at him as he attempted to flee from them. He had two gunshots wounds to the bottom of his foot and one wound to the top. The hospital gave him medication for his extreme pain, which put him in and out of sleep. He did not recall speaking to any officers at the hospital and denied telling the police that he shot himself in the foot.

In finding defendant guilty, the trial court acknowledged that the police could have done a more thorough investigation, including testing defendant for gunshot residue and test-firing the gun. But the court found that the officer who questioned defendant was believable and defendant was not, and that defendant "admits shooting himself."

3. The Appellate Court reversed outright defendant's convictions for the weapons offenses holding that the State failed to prove that defendant possessed a firearm. The court observed that the State had provided no reason why defendant's admission that he possessed the gun should be presumed to be more credible than his trial testimony denying that possession. Moreover, the version of events in the admission were "not necessarily corroborated" by the other evidence. Under that version, defendant would have had to shoot himself in the foot, run or hop to his girlfriend's apartment, get rid of the gun, and then return to the scene of the shooting where he spoke to the police, all within a short span of time.

The court gave little weight to the significance of the officer's observation of a gunshot wound to the top of defendant's foot since the officer was not an expert in gunshot wounds. The court also noted the absence of eyewitness testimony, forensic evidence and medical evidence. The court thus concluded that the State failed to prove defendant's guilt beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

In re Vuk R., 2013 IL App (1st) 132506 (No. 1-13-2506, 12/4/13)

Great deference is accorded on review to a trial judge's resolution of factual disputes.

At the conclusion of trial, the trial judge made no findings of fact but found respondent guilty of aggravated battery (great bodily harm) and not guilty of aggravated battery (public way). But at the sentencing hearing, the trial judge made the observation, "As far as I am concerned on both the government's case and the defense case, every one of those witnesses lied." The court attributed the lies to the fact that a civil case was pending, remarked that the complainant had been injured, "[b]ut it certainly did not occur the way any of these witnesses testified to."

The Appellate Court reversed. The trial judge found that the State had proved that the complainant had been injured, but not the manner of the injury. Because the respondent had introduced evidence that he was defending himself at the time of the altercation, it was also the State's burden to disprove this affirmative defense beyond a reasonable doubt. In light of the judge's stated belief that all of the witnesses had lied, the State did not sustain its burden.

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

A person commits the offense of child pornography where "with knowledge of the nature or content thereof, [he] possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . , engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection." 720 ILCS 5/11-20.1(a)(6).

Images and videos speak for themselves in determining whether such media constitutes child pornography. A trier of fact can determine the age of a child from a photograph.

Defendant was convicted of child pornography based on his possession of a compact disc

labeled "Jose's stuff" containing a video clip depicting a female performing oral sex on a male. A State's Attorney investigator, who the parties stipulated was an expert in the area of computer forensic analysis, testified that the video was labeled "13-year-old give head" and depicted "a young adolescent," "small in stature," with "underdeveloped breasts" performing fellatio.

The Appellate Court noted that the State's witness was not an expert in any field that would allow him to determine the age of an individual in the video clip. Contrary to his testimony, the female in the video was not obviously adolescent or juvenile in appearance. She was depicted in the video fully clothed wearing a sweater and bra, and only her shoulders, face and right hand were visible during the act of fellatio, so nothing indicated that her breasts were underdeveloped. Also contrary to the investigator's testimony, nothing in the file name of the disc referred the age of the female. The disc was numbered 13 in a group of consecutively-numbered videos and photographs, and thus that number was not an apparent reference to the age of the person depicted therein. The literal file name was "13givehead" rather than "13-year-old gives head."

The court acknowledged the great deference ordinarily accorded to jury determinations. Where the evidence at issue does not involve credibility determinations or observations of demeanor, the deference afforded is logically less. Because a simple viewing of the video clip itself created a reasonable doubt of defendant's guilt, the court reversed the conviction.

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§42-3
Presumptions – Affirmative Defenses

County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) A "permissive" presumption that all occupants of an auto are in possession of any firearm found therein was upheld. The presumption was proper because, as applied to the facts of this case, there was a "rational connection between the basic facts proved and the ultimate fact presumed and the latter is more likely than not to flow from the former."

The validity of a permissive presumption is not judged by a reasonable doubt test (as is a mandatory presumption), but by the "more likely than not" standard. See also, **People v. Housby**, 84 Ill.2d 415, 420 N.E.2d 151 (1981).

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) Jury instruction in deliberate homicide case (that "the law presumes that a person intends the ordinary consequences of his acts") violated due process. The jury may have interpreted the instruction as either a "burden-shifting" presumption or a "conclusive" presumption, both of which would deprive a defendant of due process.

Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) At defendant's trial for murder, the jury was instructed that: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted," and that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." These instructions violated the due process requirement that the State prove every element of the offense, since a reasonable juror could have understood the instructions as creating a mandatory presumption that shifted to the defense the burden of persuasion on the element

of intent.

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) Under the statutory scheme in question, all intentional or criminally reckless killings, unless justified, constituted felonious homicide and were murder, punishable by life imprisonment. However, if defendant proved by a preponderance of the evidence that the killing was committed in the heat of passion or sudden provocation, the offense was manslaughter, punishable by imprisonment not to exceed 20 years or by a fine.

This statutory scheme was unconstitutional. Due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. Thus, the prosecution must prove beyond a reasonable doubt the absence of heat of passion.

Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977) **Mullaney v. Wilbur** is to be applied retroactively.

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) Due process was not denied by a state statute that placed on a second degree murder defendant the burden of proving, by a preponderance of the evidence, the affirmative defense of acting under extreme emotional distress (so as to reduce the crime to manslaughter). **Mullaney v. Wilbur** was distinguished. See also, **Martin v. Ohio**, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (self-defense).

Barnes v. U.S., 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973) Possession of recently stolen property, if not satisfactorily explained, creates an inference that the person in possession knew that the property was stolen. That inference is well-founded in history, common sense and experience. See also, **People v. Housby**, 84 Ill.2d 415, 420 N.E.2d 151 (1981).

Leary v. U.S., 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) Due process violated by statutory presumption that permits jury to infer from possession of marijuana that defendant knew the substance had been illegally imported. A presumption is irrational or arbitrary unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact.

U.S. v. International Minerals, 402 U.S. 558, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) Shippers of dangerous materials are presumed to know of a regulation for safe transportation of such materials – "The principle that ignorance of the law is no defense applies whether the law be a statute or a published regulation."

People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 (1966) The burden of proof never shifts to the accused, but remains the responsibility of the prosecution throughout the trial.

People v. Smith, 71 Ill.2d 95, 374 N.E.2d 472 (1978) Once the issue of an affirmative defense is raised, the burden is on the prosecution to prove that issue (as well as all other elements of the offense) beyond a reasonable doubt. Exemptions are distinct from affirmative defenses, and defendant may be required to prove an exemption by a preponderance of the evidence.

People v. Jordan, 218 Ill.2d 255, 843 N.E.2d 870 (2006) Under Illinois law, all mandatory presumptions are unconstitutional *per se*. 720 ILCS 5/12-21.6(b), which provides that "[t]here

is a rebuttable presumption that a person committed the offense [of endangering the life and health of a child] if he or she left a child 6 years of age or younger unattended in a motor vehicle for more than 10 minutes," constitutes a mandatory rebuttable presumption. However, subsection (b) is severable from the remainder of the statute, which can be enforced.

People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 (2006) The child abduction statute (720 ILCS 5/10-5(b)(10)) defines the offense as intentionally luring or attempting to lure "a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child for other than a lawful purpose." Subsection (10) also provides that "the luring or attempted luring of a child under the age of 16 into a motor vehicle, building, housetrailer, or dwelling place without the consent of the parent or lawful custodian of the child shall be *prima facie* evidence of other than a lawful purpose."

By using the phrase "shall be *prima facie* evidence," the legislature created a mandatory presumption which shifts the burden of production of evidence concerning an element of the offense. Because all mandatory presumptions are unconstitutional under Illinois law, the (b)(10) presumption is unconstitutional.

The mandatory presumption could be severed from the remainder of the statute. An unconstitutional presumption may be severed if what remains of the statute is complete in itself and capable of being executed independently of the severed portion. Statutory provisions are not severable if: (1) they are essentially and inseparably connected in substance, and (2) the legislature would not have passed the valid portions of the statute without the invalid portions. Because the first sentence of §10-5(b)(10) contains all of the elements of the offense of child abduction and is capable of being executed without the mandatory presumption, which operates only to ease the State's burden of proving an element of the offense, the presumption can be severed.

Further, application of the presumption in this case was harmless error because it did not contribute to the verdict. When determining whether an unlawful presumption constitutes reversible error, a two-part test is followed. First, the reviewing court must determine what evidence the trier of fact actually considered in reaching the verdict. Second, the court must weigh the probative value of that evidence against the probative weight of the presumption standing alone, to determine whether the verdict was based on evidence that, independently of the presumption, established the presumed fact beyond a reasonable doubt. Use of an unconstitutional presumption is harmless where the weight of the evidence considered by the trier of fact is so overwhelming as to establish guilt beyond a reasonable doubt.

Here, defendant was tried by a judge rather than a jury. In announcing the verdict, the trial court mentioned the presumption, but also mentioned other evidence. The other evidence considered by the trial court, including defendant's statements, was sufficient to establish guilt even without the presumption.

People v. Pomykala, 203 Ill.2d 198, 784 N.E.2d 784 (2003) Whether a defendant is denied due process by a jury instruction that embodies a presumption is determined by whether a reasonable juror could have interpreted the instruction as creating an unconstitutional presumption.

720 ILCS 5/9-3(b), which provided that in reckless homicide cases "being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary," could be reasonably interpreted by a jury to require a finding of recklessness based upon the

presence of alcohol or drugs, even where there is no factual connection between the intoxication and the reckless act, unless the presumption is disproved by defendant. Thus, the statute creates a mandatory rebuttable presumption and an instruction based on the statute violates due process.

However,§9-3(b) may be severed from the remainder of the reckless homicide statute. Section 9-3(b) embodies an evidentiary rule on the issue of recklessness, but does not render the remainder of the statute unenforceable.

People v. Watts, 181 Ill.2d 133, 692 N.E.2d 315 (1998) 815 ILCS 515/3, which enacts a "rebuttable presumption" that a defendant charged with home repair fraud did not intend to perform agreed-upon work where he failed to perform the services promised, refused to return payments made under the contract, and took one of seven specified actions, including failing to employ qualified personnel or notify the customer of a change in the business's name, is unconstitutional. Section 3(c) creates a "mandatory, rebuttable presumption of intent" because the trier of fact is required to presume that defendant lacked intent to perform the contract unless defendant presents evidence to overcome the presumption, and shifts both the burden of production and the burden of persuasion.

Due process is violated where mandatory rebuttable presumptions are used in criminal cases to shift the burden of production to the defense. The presumption provision is severable from the rest of the statute. Therefore, although the presumption of intent may not be used, the statute creating the offense of home repair fraud is valid.

People v. Dinelli, 217 Ill.2d 387, 841 N.E.2d 968 (2005) Due process permits the use of permissive inferences in criminal cases if three conditions are satisfied: (1) there is a rational connection between the basic facts and the presumed fact; (2) the presumed fact is more likely than not to flow from the basic facts; and (3) the inference is supported by corroborating evidence. If there is no corroborating evidence, the link from the basic to the presumed facts must be proven beyond a reasonable doubt.

The constitutionality of a permissive inference can be tested only as applied to a particular defendant, under a particular charge, and in light of the evidence in the record. Where defendant pleaded guilty under a stipulated statement of facts but then withdrew his plea, the trial court erred by holding, in a pretrial ruling, that due process was violated by the permissive inference in question. Because it was unclear whether defendant would stand trial even after the plea was withdrawn, the record had not been subjected to adversarial testing, and the trial court had not heard any contrary evidence, it was "not at all apparent" that the inference could or would be applied to defendant.

People v. Greco, 204 Ill.2d 400, 790 N.E.2d 846 (2003) Where there is some corroborating evidence of guilt, a permissive inference (i.e., one which allows but does not require the finder of fact to infer the ultimate or presumed fact and which does not place any burden on defendant) satisfies due process if the presumed fact is more likely than not to flow from the predicate fact. Where a permissive presumption is the lone basis for a finding of guilt, the presumption satisfies the constitution only if the presumed fact flows beyond a reasonable doubt from the predicate fact.

625 ILCS 5/4-103.2(b), which permits the trier of fact to infer that a person who exercises exclusive, unexplained possession over a stolen vehicle has knowledge that the vehicle is stolen, without regard to whether the theft was recent or remote, violates due process as applied to "special mobile equipment" (vehicles which are not designed or used

primarily for the transportation of persons or property, and which are only incidentally operated or moved over a highway (such as earth movers and road construction equipment)). Under Illinois law, the unexplained, exclusive possession of *recently* stolen property gives rise to an inference that possession was obtained by theft or burglary. Thus, only when the theft is recent is there a rational connection between possession of stolen property and the knowledge that it has been stolen.

The presumption of §4-103.2(b) is unconstitutional as it pertains to special mobile equipment, which can be acquired and transferred without registration and title requirements.

People v. Funches, 212 Ill.2d 334, 818 N.E.2d 342 (2004) Although "inference" and "presumption" are sometimes used interchangeably, an "inference" is a deduction which the trier of fact may but need not draw, while a "presumption" is a rule of law which requires the fact finder to "take as established the existence of a fact . . . after certain . . . other facts . . . have been established." Statute which provides that it "may be inferred" that a person who exercises exclusive unexplained possession over a stolen or converted vehicle has knowledge that the vehicle has been stolen or converted, creates a mere evidentiary inference rather than a presumption.

A party who challenges the constitutionality of an inference must show that the inference is unconstitutional as applied to his conduct, and not merely in the abstract. The trial court erred by declaring the inference unconstitutional in a pretrial ruling, as defendant would have difficulty establishing that under the circumstances of this case, a reasonable trier of fact could not infer that he knew the vehicle was stolen. The trial court erred by finding the inference unconstitutional on its face.

People v. McQueen, 241 Ill.App.3d 509, 608 N.E.2d 1333 (4th Dist. 1993) Defendant was convicted of residential picketing based on evidence that he picketed a home at which a roofing subcontractor was performing repairs. Defendant, a member of a sheet metal workers union, carried a sign stating that the subcontractor was not complying with applicable labor regulations. 720 ILCS 5/21.1-2 provides that it is unlawful to picket "before or about the residence or dwelling of any person, except where the residence or dwelling is used as a place of business."

The State failed to establish that the residence was not used as a "place of business." The prosecution has the burden of disproving statutory exceptions which are "descriptive of the offense," while defendant must prove exceptions which remove certain acts or classes of persons from the operation of the statute. The "place of business" exception is descriptive of the offense, because use of a residence as a place of business removes the special protection afforded to residences.

People v. Miles, 344 Ill.App.3d 315, 800 N.E.2d 122 (2d Dist. 2003) Under 720 ILCS 250/16, the offense of possession of a counterfeit credit card occurs where, with intent to defraud a credit card issuer, merchant or other person, defendant possesses a purported credit card with knowledge that it has been counterfeited. Section 250/16 provides that the possession "of 2 or more credit cards or debit cards which have been counterfeited is *prima facie* evidence that the person intended to defraud or that he knew the credit cards or debit cards to have been so counterfeited."

Section 250/16 creates an unconstitutional mandatory presumption of intent to defraud. In this case defendant's intent to defraud was shown only by her possession of counterfeit credit cards. Thus, the error was not harmless.

The sentence creating the improper presumption was severable from the remainder of §16. Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Taylor, 344 Ill.App.3d 929, 801 N.E.2d 1005 (1st Dist. 2003) 720 ILCS 5/16A-4, which provides that in retail theft prosecutions a person who conceals and removes merchandise beyond the last pay station shall be presumed to have acted with the state of mind required for the offense of retail theft, creates an unconstitutional mandatory presumption. The remainder of the retail theft statute can be severed from the unconstitutional presumption.

Because the record was devoid of any indication that the trial court relied on the unconstitutional presumption in finding defendant guilty of retail theft, the conviction could stand. A trial judge is presumed to have followed the law except where the record affirmatively shows otherwise.

People v. Natal, 368 Ill.App.3d 262, 858 N.E.2d 923 (1st Dist. 2006) Under **People v. Housby**, 84 Ill.2d 415, 420 N.E.2d 151 (1981), the mere possession of recently stolen property is insufficient to sustain a burglary conviction. Here, other than defendant's possession of the property, there was no corroborating evidence of defendant's guilt. Residential burglary conviction reversed.

Cumulative Digest Case Summaries **§42-3**

People v. Cannon, 2015 IL App (3d) 130672 (No. 3-13-0672, 1/7/15)

When a criminal statute contains an exemption, the State has the burden of proving that the exemption does not apply, unless the statute specifically places the burden of proving the existence of the exemption on defendant.

The Liquor Control Act prohibits the consumption of alcohol by anyone under age 21, unless they are under the direct supervision and approval of a parent in the privacy of a home. 235 ILCS 5/6-20(e), (g). The majority held that it was the State's burden to prove that defendant's mother did not supervise and approve her son's consumption of alcohol in their home. Since there was no evidence on this issue, the State failed to prove defendant guilty of unlawful consumption of alcohol by a minor beyond a reasonable doubt.

The dissent believed the majority incorrectly equated an exemption with an affirmative defense. The State has the burden of disproving an affirmative defense once defendant presents sufficient evidence to raise the defense, but the State does not have the burden of disproving the existence of an exemption. Since the statute at issue created an exemption, not an affirmative defense, the dissent would have affirmed the conviction.

People v. Costello, 2014 IL App (3rd) 121001 (No. 3-12-1001, 10/23/14)

1. Where an offense involves a failure to perform an act, the defendant may raise an affirmative defense of impossibility if he or she could not have performed the act. Because the facts relevant to an impossibility defense are uniquely within the knowledge of the accused, impossibility is an affirmative defense which must be raised by the defense. In other words, the State is not required to prove in every case involving a failure to act that it was possible for the defendant to perform the act in question.

Thus, unless the State's evidence raises the issue, to assert the affirmative defense of impossibility the defendant must present at least some evidence showing that it was not possible to perform the act in question. Once the issue of impossibility is raised, the State

must prove beyond a reasonable doubt that it was possible for the defendant to perform the act in question.

2. Where defendant was charged with violating an order of protection by failing to turn over several weapons which the order of protection stated were kept in a gun safe at his home, defendant did not assert the defense of impossibility by showing that those firearms were not in the safe when police arrived. The mere fact that the firearms were not in the safe did not constitute evidence that the defendant was incapable of complying with the order of protection, as defendant could have hidden the firearms or given them to a friend. "A criminal defendant may not circumvent the provisions of an order of protection by failing to turn over items specified in an order of protection without offering any sort of explanation for his failure to produce the items."

Because defendant failed to present any evidence that it was impossible for him to comply with the order of protection, the burden of proof was not placed on the State. The conviction for violating an order of protection was affirmed.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

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§42-4
Circumstantial Evidence – Presence at Crime Scene

People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 (1989) State need not exclude every "reasonable hypothesis of innocence" to sustain a conviction based entirely on circumstantial evidence. The reasonable doubt test is the same, whether the evidence is direct or circumstantial.

People v. Boyd, 17 Ill.2d 321, 161 N.E.2d 311 (1959) Mere presence at the scene of a crime is not in itself sufficient to establish guilt beyond a reasonable doubt. See also, **People v. Wilson**, 19 Ill.App.3d 625, 312 N.E.2d 30 (4th Dist. 1974).

People v. Morehead, 45 Ill.2d 326, 259 N.E.2d 8 (1970) When a defendant elects to explain his presence at the scene of an offense, it is incumbent upon him to tell a reasonable story or be judged by its improbabilities. The trier of fact is entitled to disbelieve defendant's explanation, especially when he told a different story at the time of arrest.

People v. Rhodes, Van Zant & P.W., 85 Ill.2d 241, 422 N.E.2d 605 (1981) These consolidated cases presented the issue whether the accused's fingerprint, found at the scene of a burglary, was sufficient to prove guilt of burglary beyond a reasonable doubt (**Rhodes; Van Zant**) or a preponderance of the evidence at a probation revocation proceeding (**P.W.**).

A fingerprint is circumstantial evidence which connects defendant to an offense, and is sufficient to sustain a conviction when "found in the immediate vicinity of the crime under such circumstances as to establish beyond a reasonable doubt that the fingerprints were impressed at the time the crime was committed." Here, the evidence showed that the fingerprints were impressed at the time of burglaries.

In **Rhodes**, defendant's fingerprint was found on a glass fragment near a broken kitchen door window, the point of the illegal entry. The kitchen door was not accessible to the public, and according to the victim defendant had never been in the house. In **Van Zant**, defendant's fingerprint was found on a radio which had been moved during the burglary. In

P.W., defendant's fresh thumb print was found on a glass fragment which had caulking on it and which was found near a broken garage window, the point of entry. "It is readily inferable that the print was impressed while the glass was being lifted out of the window, so the burglar could enter without being cut." It was not reasonable to hypothesize that defendant casually walked past the window, which faced a walkway, and pressed his thumb on the corner of the window.

People v. Fletcher, 72 Ill.2d 66, 377 N.E.2d 809 (1978) Defendant's conviction for attempt burglary upheld; the evidence established more than "mere presence and flight." Defendant was "positively identified" by two witnesses as one of two men running from the vicinity of an attempt burglary, one witness identified defendant as being in the area in the same car two days earlier, defendant attempted to prevent police entry into his hotel room, and defendant attempted to alter his appearance at a lineup.

People v. Bolden, 59 Ill.App.3d 441, 375 N.E.2d 898 (1st Dist. 1978) Involuntary manslaughter convictions reversed because the evidence showed mere presence at the scene and flight.

People v. Mitchell, 59 Ill.App.3d 367, 375 N.E.2d 531 (1st Dist. 1978) Bench trial conviction for criminal damage to property was reversed; the evidence showed, at best, mere presence at the scene and flight.

People v. Whittenburg, 37 Ill.App.3d 793, 347 N.E.2d 103 (1st Dist. 1976) Delinquency adjudication for burglary reversed. Circumstantial evidence of defendant's presence near the scene and his flight was insufficient to sustain the finding of guilt.

People v. Gomez, 215 Ill.App.3d 208, 574 N.E.2d 822 (2d Dist. 1991) Circumstantial evidence was insufficient to prove defendant guilty of murder here.

Although defendant's fingerprint was found in a kitchen drawer in the decedent's home, the fingerprint was not found in the immediate vicinity of the crime and under such circumstances that it could only have been made at the time of the crime. Defendant lived in a rooming house owned by the decedent and admitted that he had been in the victim's kitchen on at least two occasions when he paid his rent.

Blood, hair, and paint samples did not establish defendant's guilt; the blood was found in a public hallway at the rooming house, the paint was an extensively distributed house brand of a national hardware chain, and the hair differed in several respects from that of defendant. Because the hair and paint did not have sufficient unique qualities to allow positive identification, they had "relatively little probative value."

People v. Zizzo, 301 Ill.App.3d 481, 703 N.E.2d 546 (2d Dist. 1998) Under **People v. Gomez**, 215 Ill.App.3d 208, 574 N.E.2d 822 (2d Dist. 1991), where fingerprint evidence is the sole evidence of guilt, the fingerprints "must have been found in the immediate vicinity of the crime and under such circumstances that they could have been made only at the time the crime occurred." The **Gomez** rule was inapplicable here, however, because the conviction was not based solely on fingerprint evidence.

People v. Holsapple, 30 Ill.App.3d 976, 333 N.E.2d 683 (5th Dist. 1975) Defendant's conviction for murder was reversed. The evidence was wholly circumstantial and did not

exclude the possibility that someone other than defendant entered the cabin in question and killed the deceased. "It is difficult to believe the defendant could have done so much in so little time; that human hair matching neither the deceased nor defendant was found on the dress and torn, blood-stained underpants of the deceased[,] no blood of defendant was found in the blood-splattered cabin[,] and no fingerprints of defendant were found," especially where the State conceded that there had been no effort to destroy prints.

People v. Abendroth, 52 Ill.App.3d 359, 367 N.E.2d 571 (4th Dist. 1977) Convictions for three counts of arson reversed. Where the only evidence connecting defendant to the fires was a statement admitting setting a fire at the property in November or early December, 1975, defendant could not be convicted for setting fires in February, 1976.

People v. Huth, 45 Ill.App.3d 910, 360 N.E.2d 408 (1st Dist. 1977) Defendant and two others were in an automobile in which cannabis was found partially concealed under a seat. Defendant was a passenger, but was closest to the cannabis.

Since defendant was merely a passenger, he "lacked sufficient dominion over the vehicle to warrant his constructive possession of the contraband." Furthermore, "mere proximity is not sufficient evidence of actual possession."

People v. Thomas, 47 Ill.App.3d 402, 362 N.E.2d 7 (5th Dist. 1977) Defendant was arrested about ½ mile from a salvage yard which had been burglarized about three hours earlier. At the time of the arrest, defendant had mud on his shoes and vegetation on his clothes.

Conviction reversed. Defendant was not identified as having been at the scene, and there was no evidence that the mud and vegetation on defendant was comparable to any substance within the salvage yard. Furthermore, a comparison of a shoe print found in the salvage yard and defendant's shoe was not conclusive, since an expert admitted that "there were insufficient individual characteristics for a positive identification to be made."

People v. Curtis, 45 Ill.App.3d 771, 360 N.E.2d 122 (4th Dist. 1977) Three defendants were convicted of burglary based primarily on the fact that they were in an automobile in which stolen property had been removed from the trunk. Driver's conviction upheld because he had the use of the car (which was owned by his girlfriend) and did not explain the fact that the stolen property was in the car trunk. The convictions of the passengers were reversed; the evidence against them amounted to "mere presence" in a car containing stolen property.

Cumulative Digest Case Summaries **§42-4**

In re Gregory G., ___ Ill.App.3d ___, 920 N.E.2d 1096 (2d Dist. 2009) (No. 2-08-0120, 12/9/09)

The court found that there is an irreconcilable split of Illinois Supreme Court authority concerning whether the three-part test of **People v. Housby**, 84 Ill.2d 415, 420 N.E.2d 151 (1981) applies to all inferences from circumstantial evidence, or only to the inference from possession of recently stolen property. The court declined to resolve the split of authority here, finding that under both **Housby** and the "rational trier of fact" standard, the evidence was insufficient to convict defendant of battery for striking a security guard over the head with a bottle.

The evidence consisted of the following: (1) the guard was struck by a bottle that was held, not thrown; (2) the bottle broke; (3) a group of 100 people were in the vicinity; (4) several

other members of the crowd carried beer bottles; and (5) two minutes after the incident, the guard saw defendant holding a broken bottle. The court concluded that it was unreasonable to infer from such evidence that defendant was the person who struck the guard.

Defendant's delinquency of adjudication was reversed.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Fernandez, 2016 IL App (1st) 141667 (No. 1-14-1667, 12/20/16)

A defendant has constructive possession of contraband where he knows the contraband was present and exercised "immediate and exclusive" control over the area where the contraband was found.

The police obtained a search warrant for a house and garage. On the evening before they conducted the search, the police saw defendant get out of car and engage in a suspected narcotics transaction. The police arrested defendant and found him in possession of suspected heroin. They also recovered keys from defendant. They found suspected heroin and a woman inside defendant's car. (The State never charged defendant with any offenses related to the heroin recovered from defendant or his car.)

The following morning the police searched the home and garage. The keys found on defendant opened the locks to both the home and the garage. The police found an unidentified man in the house. In a bedroom, the police found a gun underneath a mattress, a passport and insurance cards with defendant's name, and framed photographs of defendant and the woman in the car. The closet had men's and women's clothing. The police found more framed photographs of defendant and the woman in the living room. In the garage, the police found three guns, ammunition, and heroin in a broken van with flat tires. The parties stipulated that defendant received mail at another address.

The court held that the State failed to prove defendant was in constructive possession of the heroin and guns found inside the house and garage. The court noted that evidence of residency, which often takes the form of rent receipts, utility bills, or mail, did not link defendant to the house and garage. Instead, the only mail addressed to defendant linked him to another residence. Although the police found numerous personal effects tied to defendant in the house (insurance cards, passport, framed pictures) and defendant's keys unlocked the house and garage doors, none of this evidence showed defendant's control over the premises. And the presence of another man in the house weighed against a finding that defendant controlled the premises.

Even if defendant had some connection with the residence, no evidence placed him there on the date of the search. All the contraband was concealed, either under a mattress or inside the inoperable van. Even assuming defendant had access to the house and garage, nothing suggested he knew about the hidden contraband.

The court reversed defendant's convictions.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

People v. Jones, 2014 IL App (3d) 121016 (No. 3-12-1016, 11/17/14)

Defendant was convicted of cannabis trafficking, 720 ILCS 550/5.1(a), an offense requiring the State to prove that defendant knowingly possessed the cannabis. Defendant argued on appeal that the State failed to prove he knew the FedEx package he possessed contained cannabis.

1. Knowledge can rarely be shown through direct proof and may instead be established by defendant's acts, declarations, or conduct supporting the inference that he knew about the cannabis. While a trier of fact may infer knowledge from suspicious behavior, mere possession

of an unopened package containing cannabis is insufficient to prove knowledge.

Here, there were numerous suspicious circumstances that would have allowed a trier of fact to find that defendant knew about the cannabis in the FedEx package. Defendant picked up the package from his stepmother's house where it had been delivered. He then took possession of the package even though it did not have his name or address on it. He claimed it was wrongly delivered and left with the package to ostensibly return it to FedEx, but was not driving in the direction of the FedEx facility when he was stopped. Defendant also made a series of false statements about the package after he was arrested. Based on these factors, a rational trier of fact could easily infer that defendant knew the package contained cannabis.

2. The court rejected defendant's reliance on the First District's decision in **People v. Hodogbey**, 306 Ill. App. 3d 555 (1999) for the proposition that "suspicious behavior in the vicinity of narcotics will not suffice as proof of knowledge as to their presence." The court agreed with the Second District's decision in **People v. Brown**, 2012 IL App (2d) 110640, pointing out that the proposition stated in **Hodogbey** was actually based on a misreading of an Illinois Supreme Court case, **People v. Jackson**, 23 Ill. 2d 360 (1961), which stated the exact opposite, *i.e.*, that suspicious behavior *may* constitute proof of knowledge.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Tates, 2016 IL App (1st) 140619 (No. 1-14-0619, 8/3/16)

To convict a defendant of possession of controlled substances, the State must prove that the drugs were in defendant's immediate and exclusive control. Constructive possession does not require actual dominion over the drugs, but can be inferred from an intent and capability to maintain control. Control of the location where the drugs are found is not essential to prove constructive possession.

The police executed a search warrant on a single family house. Inside they found several men including defendant and another man who were sitting at a dining room table covered with drugs and packaging materials. There was no evidence defendant was touching any of the items on the table. When the police entered, all the men fled and defendant was arrested outside the house. No weapons, drugs, or money were found on defendant.

The court held that the State failed to prove that defendant possessed the controlled substances. There was no evidence that defendant exercised control over the premises such that a trier of fact could infer his control over the drugs. Although defendant was sitting at the dining room table when the police entered, there was no evidence he touched any of the drugs or other materials on the table. While defendant must have been aware of the drugs, nothing proved that he was in possession of them.

Defendant's conviction for possession of controlled substances was reversed.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

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§42-5
Conflicting, Confusing, Unbelievable Testimony

People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96 (1958) Testimony of alleged victim and

another witness, which contained numerous inconsistencies and improbabilities, was insufficient to sustain the conviction. Where testimony is contrary to the laws of nature or universal human experience, the reviewing court is not bound to believe it.

People v. Kilgore, 59 Ill.2d 173, 319 N.E.2d 489 (1974) Conviction for murder reversed. There were three different descriptions of the man who fled the scene, the actual identification of defendant was contradicted by two other occurrence witnesses, and three of the four occurrence witnesses testified that the assailant had a "bush" haircut though a police officer who talked with defendant 30 minutes after the crime testified that defendant did not have such a haircut.

People v. Hister, 60 Ill.2d 567, 328 N.E.2d 531 (1975) Evidence was insufficient to prove defendant guilty of murder beyond a reasonable doubt where the testimony was inconsistent pertaining to the description of defendant and the co-defendant, their clothing, the number of persons with them, the type of automobile they were driving, whether they were armed and with what type of weapon, what witnesses were present, the sequence and location of the events leading up to the shooting and the number of shots fired.

People v. Dawson, 22 Ill.2d 260, 174 N.E.2d 817 (1961) Bench trial conviction reversed. It was incredible that defendant, a person of good character and reputation, would go to an office where he was known, identify himself by his police badge, demand money at gunpoint, and make no attempt to flee.

People v. Pellegrino, 30 Ill.2d 331, 196 N.E.2d 670 (1964) Bench trial conviction based on testimony of a drunk and a witness who had changed her story was reversed. Trial judge's finding on credibility of witnesses is entitled to great weight, but is not conclusive.

People v. Schott, 145 Ill.2d 188, 582 N.E.2d 690 (1991) The previous standard of review for sex offenses (that the testimony of the sex-offense victim be "clear and convincing or substantially corroborated") should no longer be followed. Instead, courts are to apply to sex offenses the same standard applied to other criminal cases - whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See also, **People v. Jendras**, 216 Ill.App.3d 149, 576 N.E.2d 229 (1st Dist. 1991) (it is doubtful that any one-on-one crime can be proven without either clear and convincing testimony by the victim or independent corroboration; where the complainant's testimony is vague, unconvincing, or uncorroborated, defendant's denial of guilt should be given the benefit of the doubt).

The evidence here was "so unsatisfactory that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." The State's key evidence was the testimony of the complainant, which was impeached numerous times and contained so many inconsistencies and contradictions that it lacked credibility. The complainant admitted lying "a lot," making several inconsistent statements about the offense, and telling several people that the accusations were false. She also admitted being sexually active with other children and told the police that she had been molested by another man and boy, although she later recanted this allegation. The complainant was impeached to such a degree that the evidence was insufficient to establish guilt beyond a reasonable doubt.

People v. Yarbrough, 67 Ill.2d 222, 367 N.E.2d 666 (1977) Although there was a conflict

between the testimony of two State witnesses, the resolution of that conflict was for the trier of fact. The jury "obviously preferred" the testimony of one witness over the other, and there is nothing to suggest that the first witness was not to be judged credible. Furthermore, the testimony of one credible witness is sufficient to convict. Armed robbery conviction affirmed.

People v. Fields, 135 Ill.2d 18, 552 N.E.2d 791 (1990) Murder conviction upheld despite discrepancies in the testimony of State witnesses, most of whom were rival gang members. The trial judge, as trier of fact, was aware of the problems in the testimony and was able to observe the demeanor of the witnesses.

People v. Smith, 3 Ill.App.3d 64, 278 N.E.2d 551 (1st Dist. 1971) Conviction reversed where the testimony of the State's prime witness was contradictory, impeached and incomplete. In addition, there were about 18 other witnesses to the incident whose names and addresses were known to the State, but who were not called as witnesses.

People v. Broome, 130 Ill.App.2d 227, 264 N.E.2d 772 (1st Dist. 1970) Conviction reversed where State's case rested on one witness's observation of the figure of a man, an identification made by a 15-year-old under adverse circumstances, and another witness whose testimony directly conflicted with that of the 15-year-old.

People v. Quintana, 91 Ill.App.2d 95, 234 N.E.2d 406 (1st Dist. 1968) Bench trial conviction reversed. Uncorroborated testimony of police officer was insufficient to convict of possession of marijuana where officers admittedly "shook down" defendant five times in four months and repeatedly importuned defendant to become an informer.

People v. Newson, 133 Ill.App.2d 511, 273 N.E.2d 478 (1st Dist. 1971) Numerous conflicts in testimony of State witnesses created a reasonable doubt; there were discrepancies in descriptions of defendant, his clothing and the type of weapon used.

People v. Wright, 147 Ill.App.3d 302, 497 N.E.2d 1261 (1st Dist. 1986) Defendant was convicted at a bench trial of rape, robbery, and unlawful restraint. The State's crucial witness was the complainant, who testified that defendant accosted her at a bus stop in the afternoon, pushed and pulled her along several streets, raped her twice in buildings, and took her into two liquor stores to make purchases. After about four hours, the complainant and defendant ended up on a playground.

The complainant's testimony was unbelievable - her "narration of the events has greater value as fiction than as credible evidence," noting, *inter alia*, the complainant's lack of resistance or outcry, her failure to attempt to escape though on the public streets, and the absence of physical evidence such as bruising or torn or disheveled clothing. Also, it was unbelievable that defendant would have escorted the complainant into a liquor store if he had committed the acts which she claimed he did. Reversed. See also, **People v. Yeager**, 229 Ill.App.3d 219, 593 N.E.2d 699 (1st Dist. 1992) (conviction reversed where the complainant's testimony concerning defendants' actions and physical positions seemed suspect, the physical evidence was consistent with defendants' version of events, complainant was neither injured nor had torn clothing despite allegedly being subjected to repeated forcible intercourse, complainant did not resist despite her large size, and complainant had a motive to lie if defendants failed to pay her for acts of prostitution); **People v. Anderson**, 20 Ill.App.3d 840, 314 N.E.2d 651 (1st Dist. 1974) (doubtful that attacker could accost complainant in daylight

and force her across busy street without attracting attention; it also incongruous that complainant was afraid to make outcry but engaged in veritable wrestling match with the attacker).

People v. McCarthy, 102 Ill.App.3d 519, 430 N.E.2d 135 (1st Dist. 1981) Defendant, an off-duty police officer, was convicted at a bench trial of aggravated battery. The incident arose following a collision between defendant's car and a car in which the alleged victim was riding. Defendant and a passenger in his car testified that defendant shot in self-defense after the alleged victim pointed a gun at him. The alleged victim and the four occupants of that vehicle testified that the victim did not use a gun. Following the incident, a toy gun was found in the glove compartment of the alleged victim's vehicle.

Though the case was basically one of credibility, the testimony of the State witnesses was insufficient to prove guilt. There were "too many instances of witnesses changing their stories, too many details that are inconsistent, and too many details that are exactly the same in the testimony of several witnesses." Conviction reversed.

People v. Smiley, 32 Ill.App.3d 948, 337 N.E.2d 290 (1st Dist. 1975) Defendant was convicted of battery, at a bench trial. Only the complaining witness and defendant testified. The complaining witness said that he heard a noise in the alley behind his house and saw defendant looking through garbage cans. When he asked what defendant was doing, defendant hit the complainant.

Defendant testified that he was walking down the alley when the complaining witness asked what he was doing, to which defendant responded that he did not have to answer questions. The complaining witness then threw defendant against a fence, and a scuffle ensued.

The testimony of the complaining witness was "unconvincing and contrary to human experience," and defendant's testimony was "more consistent with human experience." Conviction reversed.

People v. Sowers, 36 Ill.App.3d 599, 344 N.E.2d 800 (5th Dist. 1976) Defendant's conviction for armed robbery of a gas station was reversed. The station attendant testified that near closing time, a masked person came into the station with a shotgun. The robber took money from the cash drawer, sat at a desk, removed his mask, and counted the money. In the meantime, a customer came to the station to buy gas, and the robber gave the attendant money to make change. Although the attendant was with the customer about 35 feet from the robber for about five minutes, he never mentioned the robbery. The robber took only $60, and returned the remaining money.

After the robber left, the attendant counted the money and closed the station. As he was going home he flagged down a police car. The attendant failed to find the robber in two police mug books, but after pressure from the police said that he thought the robber had been "Sowers." He subsequently identified a photo of defendant and identified him at a one-man showup.

The attendant's testimony was "at least improbable if not incredible." In addition, defendant was found 1½ hours after the incident with nothing incriminating in his possession, and he gave the police an alibi which he repeated without contradiction at trial. Police contacted only two of defendant's alibi witnesses, both of whom corroborated the alibi, and apparently did not attempt to contact the other alibi witnesses.

People v. Warren, 40 Ill.App.3d 1008, 353 N.E.2d 250 (1st Dist. 1976) Defendant's conviction for possession of marijuana was reversed because the trial judge, after hearing the evidence, indicated continuous doubts as to defendant's guilt. The only witnesses were a police officer and defendant, and though the judge disbelieved defendant's testimony he also found it difficult to believe the policeman.

People v. Villalobos, 53 Ill.App.3d 234, 368 N.E.2d 556 (1st Dist. 1977) A conviction cannot rest solely upon the impeachment of a defense witness and of the State's own witness.

People v. Kinsloe, 281 Ill.App.3d 799, 666 N.E.2d 872 (1st Dist. 1996) Fact that defense witness was impeached merely removed her testimony from the jury's consideration, and did not justify an inference that because her testimony exonerating defendant was unbelievable, defendant must be guilty.

People v. Lindsey, 73 Ill.App.3d 436, 392 N.E.2d 278 (1st Dist. 1979) Defendant's convictions for murder, rape and arson were reversed in light of the numerous inconsistencies and contradictions in the testimony of the State witnesses. "The inconsistencies in the testimony . . . were not only contradictory but diluted this evidence to the level of palpable improbability and incredulity, thereby creating a reasonable doubt" of guilt.

People v. Johnson, 191 Ill.App.3d 940, 548 N.E.2d 433 (1st Dist. 1989) Defendant and a codefendant (Acosta) were jointly tried, at a bench trial, for delivery of cocaine. An undercover police officer testified that he and an informant arranged to purchase cocaine. The officer talked with Acosta, who agreed to sell him the cocaine. When the officer and the informant arrived at the location of the sale, a tavern parking lot, Acosta introduced defendant to the officer. Defendant stated that the cocaine had not arrived but that he could get some in the tavern. Defendant went into the tavern. When he returned, he handed the officer several paper packets. The officer asked for defendant's phone number, and defendant gave him a slip of paper containing defendant's name and the tavern's phone number.

The officer testified that he delivered the packets to a crime lab two weeks later. It was stipulated that the packets contained cocaine. After the State rested, the trial judge granted a directed verdict as to the codefendant. The judge gave no reasons for the directed verdict.

Defendant testified that the informant had tried to get him involved in drugs, but he had refused. On the night of the incident, defendant was in the tavern when the informant entered and said he wanted defendant to meet some friends outside. When defendant went outside, a man who possibly was the officer waved from a car. When the informant mentioned that this concerned drugs, defendant said he did not want to be involved and went back into the tavern. Defendant looked back outside and saw the informant hand something to the man in the car.

Defendant was arrested about 16 months after the above incident. Although the officer claimed that other agents had seen the transaction, none testified. Finally, defendant had made a pretrial request that the informant be produced for trial. The State responded that it did not want to produce the informant for such a small case. Although the State was ordered to produce the informant, it failed to do so.

This evidence was insufficient to prove guilt. The unexplained absence of an informant who was allegedly present at the transaction gives rise to an unfavorable inference that his testimony would be unfavorable to the State. See, **People v. Guido**, 25 Ill.2d 204, 184 N.E.2d 858 (1962).

The record failed to show why the informant was not produced for an interview or called at trial. No slip of paper in defendant's handwriting was produced, nor was its absence explained. The officer never explained the lapse of two weeks between the time he allegedly received narcotics from defendant and the time he brought the narcotics to the crime laboratory. None of the other eleven agents who were part of the surveillance team testified. The officer failed to explain why he waited almost 16 months before he filed any charges.

Finally, if the case was decided on "credibility," as the trial judge said, it was inconsistent that the codefendant was acquitted. The officer's testimony, if believed, established the codefendant's guilt as a co-conspirator.

People v. Carter, 19 Ill.App.3d 21, 311 N.E.2d 213 (1st Dist. 1974) Conviction reversed. Crucial testimony was by two brothers of the deceased, who testified that defendant said "shoot man shoot" to his accomplice. The brothers' testimony was improbable since neither of them mentioned those words to the police when they reported the shooting or at the coroner's inquest, and at the grand jury one brother testified that the attackers "didn't say nothing."

People v. Mixer, 8 Ill.App.3d 531, 290 N.E.2d 705 (1st Dist. 1972) Bench trial conviction reversed. Incredible that after the incident defendant took alleged rape victim to police station to ask directions.

People v. Brown, 99 Ill.App.2d 281, 241 N.E.2d 653 (1st Dist. 1968) Complainant's testimony was insufficient where it was impeached in part by her own statements and where she changed her version of the events. In addition, her story reached the realm of unreality when she claimed defendant was doing four different things with his hands at the same time.

People v. Turner, 13 Ill.App.3d 1079, 302 N.E.2d 365 (5th Dist. 1973) Circumstantial evidence was insufficient to convict — "to sustain this conviction, we must believe" that defendant was considerate enough to warn the intended victim of the burglary but "foolish enough to voluntarily turn over the fruits and evidence of his crime to the police."

People v. Poltrock, 18 Ill.App.3d 847, 310 N.E.2d 770 (1st Dist. 1974) Bench trial conviction reversed due to cumulative effect of contradictions — each of the three complainants claimed he was hit first by defendant and that only defendant landed blows.

People v. Delacruz, 352 Ill.App.3d 801, 817 N.E.2d 191 (2d Dist. 2004) Where both of the State's witnesses in a home invasion case admitted that defendant had lived in the complainant's apartment until at least 17 days before the offense and there was conflicting testimony as to whether defendant was still living at the apartment on the date of the offense, there was "at least a reasonable doubt" whether defendant resided in the dwelling on the date of the offense.

Because the evidence was "so unsatisfactory and unsettled," a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could not have concluded beyond a reasonable doubt that defendant entered the "dwelling place of another."

People v. Williams, 383 Ill.App.3d 596, 891 N.E.2d 904 (1st Dist. 2008) In considering a challenge to the sufficiency of the evidence, the relevant question is whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt. Here, the evidence was insufficient to sustain a conviction for aggravated kidnaping as an accomplice. The only evidence of guilt - the testimony of two children - was "riddled with internal inconsistencies and self-contradictions" was "hesitant" and "vague," and was "impeached by the testimony of other witnesses and . . . .telephone records."

People v. Gonzalez, 2015 IL App (1st) 132452 (No. 1-13-2452, 6/30/15)

1. Two police officers in a squad car approached a group of 10 men standing in the middle of the street. One of the officers testified that all of the men were throwing bricks and bottles into the street at passing cars while shouting gang slogans. The other officer saw the men in the middle of the street, but did not see any of them throw bricks.

Both officers testified that a group of pedestrians approached the 10 men and then turned and walked the other direction. When the officers exited their car, six of the 10 men ran away while the other four, including defendant, dropped their bricks and approached the officers. On cross, the officer testified that he did not actually see any of the four men who approached the officers throw a brick at a car.

2. The Appellate Court held that the State failed to prove defendant guilty of reckless conduct, which requires proof that defendant recklessly performed an act that endangered the safety of another person. 720 ILCS 5/12-5(a)(1). The first officer testified inconsistently, at one point saying he saw the defendants throwing bricks and at another point saying he did not see them throwing bricks. Even his testimony about seeing "the defendants" throwing bricks concerned the actions of the 10 men as a group and did not distinguish between defendant and any of the other men. And the second officer testified that he didn't see anyone throwing bricks. Under these circumstances, the State failed to prove defendant guilty of reckless endangerment.

3. Even assuming defendant threw bricks at passing cars, the State also failed to prove that these actions endangered the safety of other people. There was no evidence of any complaints about personal or property damage, and no testimony that the bricks struck any cars or pedestrians. None of the pedestrian who turned around and walked the other way testified that they believed their safety was endangered. Under these facts, it would have been mere speculation that anyone felt endangered by defendant's alleged actions.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

People v. Herman, 407 Ill.App.3d 688, 945 N.E.2d 54 (1st Dist. 2011)

The court reversed the convictions of a Chicago police officer for criminal sexual assault, official misconduct, and kidnaping on the ground that the flaws in the testimony of the complaining witness made it impossible for any fact finder reasonably to accept any part of it.

The physical evidence was as consistent with defendant's testimony of a consensual encounter as it was with the complainant's testimony of force. Complainant was a crack addict and was admittedly high during the entire night of the encounter.

Her testimony was fraught with inconsistencies and contradictions, particularly with respect to the time line of events. Although complainant initially reported to police and medical personnel that the offenses occurred anywhere from 3 a.m. to 5 a.m., at trial she

testified that the events occurred after she left her apartment at 5:25 a.m. This time period happened to coincide with the 25-minute gap from 5:58 a.m. and 6:23 a.m. during which defendant could not provide independent corroboration of his whereabouts. Complainant's version of the time line was also contradicted by the testimony of her daughter; her testimony regarding her presence in defendant's police car was contradicted by her previous sworn statement regarding where she sat in the car; she described the vehicle as being caged, but defendant's car had no cage; she observed no boombox in the car, although an evidence technician found one in the back seat when the car was sequestered that morning; and she testified defendant wore an ankle holster, but no holster was recovered. Contrary to the trial court's findings, these inconsistencies were not minor and shed significant doubt on her testimony.

The trial court's finding that defense witnesses' testimony was not credible was not grounded in the evidence. The court rejected evidence that the complainant sought $5000 to "make the case go away" because if that had occurred, complainant would have been immediately arrested. This was mere speculation based on the trial court's perception of what would have been required. Also, contrary to the trial court's finding, a witness had documented the attempted bribe in her report and reported it to her supervisor. The trial court's rejection of defendant's internally consistent, unimpeached, and unrebutted testimony was also unsupported.

People v. Rivera, 2011 IL App (2d) 091060 (No. 2-09-1060, 12/9/11)

The court reversed defendant's conviction for first-degree murder, concluding that no rational trier of fact could have found the evidence sufficient to convict.

1. Not only was there no physical evidence linking defendant to the offense, defendant was excluded as the source of the male DNA profile derived from a vaginal swab of the victim. While "DNA does not trump all other evidence," it may raise a reasonable doubt as to the identity of the perpetrator. Where there was evidence that the offender engaged in sexual relations with the victim shortly before she died, the DNA exclusion of defendant "embedded reasonable doubt deep into the State's theory."

The court rejected as speculative the State's argument that the DNA evidence was contaminated. It also rejected the argument that the DNA exclusion evidence was not exculpatory on the theory that the explanation for the exclusion was that the victim had engaged in intercourse with another male before she was sexually assaulted and murdered by defendant. It was unreasonable to expect the jury to believe that the defendant violently perpetrated the sexual assault and murder, without leaving any physical trace of his presence at the scene or on the victim, yet left intact in the victim's body the DNA of the unidentified male.

2. The State also presented evidence of admissions made by defendant to jailhouse informants. No reasonable trier of fact could have found their testimony credible in the face of the DNA evidence and the effective cross-examination by defense counsel that exposed their motivations. One witness hoped to profit financially by involving himself in the case. The other was a drug user who came forward only after defendant's family turned their backs on him for using drugs while staying in their house.

3. The remaining piece of evidence was defendant's statements. When an individual charged with a crime confesses, the "corroboration rule requires that the *corpus delicti* be proved by some evidence *aliunde* admission of a defendant." The independent evidence and details of the confession are not required to correspond in every particular, but the State's independent evidence must inspire belief in the defendant's confession. Because the

statements were the only remaining piece of evidence, given the DNA evidence, the State failed in its burden to present evidence *aliunde* the statements to establish the offense.

The court rejected the State's argument that defendant's statements including a "damning knowledge of the facts." Over the course of four days, no fewer than ten law enforcement personnel discussed the crime with defendant or interrogated him. The police also used leading questions incorporating the facts of the case in their interrogation of the defendant. The record supports the inference that details of the offense were provided to the defendant, intentionally or unintentionally, during the investigative process.

Many of the facts referenced in the defendant's statements had also been published in the newspapers, and defendant's father read those reports and discussed them with defendant. The State did not prove that defendant had not learned those details independent of news reports.

People v. Shaw, 2015 IL App (1st) 123157 (No. 1-12-3157, 9/17/15)

The testimony of a single witness is sufficient to support a conviction, but only if it is "positive and credible." Such testimony is insufficient where no reasonable person could accept it beyond a reasonable doubt. Although great deference is given to the factual findings of the trier of fact, when those findings are against the manifest weight of the evidence, the reviewing court is required to reject them.

The Appellate Court reversed defendant's conviction finding that the victim's testimony, which made up almost all of the State's case, contained so many material inconsistencies, including inconsistencies with the surveillance videos and testimony from police officers, that it was "too improbable, unconvincing, and contrary to human experience to sustain the conviction." In particular, the victim specifically testified that defendant was armed with a weapon and pointedly displayed the weapon to the victim. No weapon, however, was ever recovered and the remainder of the evidence, especially the surveillance videos, demonstrated that defendant never had an opportunity to dispose of the weapon. Under these circumstances, no reasonable trier of fact could have found the victim's testimony credible, and thus the State failed to prove defendant guilty beyond a reasonable doubt.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

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§42-6
Doubtful Identification

Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) There are five factors to consider in evaluating eyewitness identifications: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the witness's level of certainty; and (5) the length of time between the crime and the identification. See also, **People v. Lewis**, 165 Ill.2d 305, 651 N.E.2d 72 (1995) (same).

People v. Johnson, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) A positive identification by a single witness, who has ample opportunity for observation, is sufficient to support conviction.

People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965) A conviction cannot be sustained if the identification of the accused is vague, doubtful and uncertain. Here, police officers

looking inside a building from a passing car were not afforded a favorable opportunity for positive identification.

People v. Bartley, 25 Ill.2d 175, 182 N.E.2d 726 (1962) Conviction reversed where only eyewitness was unable to identify defendant, the other evidence was circumstantial, and defendant presented alibi testimony.

People v. Charleston, 47 Ill.2d 19, 264 N.E.2d 199 (1970) Where witness gave a description of the assailant to police after the incident but failed to disclose that she knew defendant's name, a reasonable doubt existed.

People v. Ash, 102 Ill.2d 485, 468 N.E.2d 1153 (1984) Evidence was insufficient to prove defendant guilty beyond a reasonable doubt.

The evidence connecting defendant to the crimes (armed robbery, home invasion, and unlawful restraint) consisted of the testimony of an accomplice and the victim's identification. The accomplice was seeking lenient treatment, agreed to testify against defendant only after the State threatened to rescind the prior plea agreement, and admitted that he would "do just about anything," including lie, to avoid imprisonment.

In addition, the complainant's identification of defendant was vague and doubtful. Defendant was six inches shorter than the description given by the victim, who did not identify defendant from mug shots shown to her the day after the incident. At a suppression hearing, the complainant misidentified two attorneys seated in court as the perpetrator, and though defendant was in custody within four days of the crime, the victim did not view him until four months later.

People v. Slim, 127 Ill.2d 302, 537 N.E.2d 317 (1989) The victim, the only occurrence witness, testified that as he walked from his car about 1:45 a.m., a man approached, stuck a gun in his face, took his wallet, and drove away in his car. The victim described the robber as 28 years old, 135 pounds, and 5'3" tall.

Ten days later, the victim's car was found in Milwaukee. Defendant was a passenger in the car. Defendant was arrested, and on the following day was placed in a lineup and identified by the victim. The victim also identified defendant at trial.

Defendant's father testified that on the night of the robbery defendant was at home in Milwaukee. The father also stated that defendant had distinctive features - teeth braces and unusually thick lips. The father described defendant as 22 years old, 165 pounds, and 5'9" tall. Another defense witness testified that defendant wore braces at the time of the crime and estimated defendant's height as 5'2".

The discrepancies and omissions as to facial or other physical characteristics were not fatal, but simply affected the weight of the identification testimony which the trier of fact must assess. Furthermore, discrepancies regarding height and weight were not uncommon; "few persons are trained as keen observers," and persons in criminal cases are under stress when their impressions are formed. In addition, defendant's father and the other defense witness who knew defendant "gave sharply different estimates" as to his height." Finally, the 11-day interval between the crime and the lineup was not significant, and defendant's arrest in the victim's stolen car was corroborating evidence.

People v. Hernandez, 312 Ill.App.3d 1032, 729 N.E.2d 65 (1st Dist. 2000) Identification testimony of the single eyewitness was insufficient to establish guilt beyond a reasonable

doubt. Although the eyewitness saw the decedent and another man arguing from a distance of about 90 feet, he saw only the backs of the two men's heads "until the shooter momentarily exposed his profile." In addition, the witness told officers he was "unsure" if he could identify anyone because he had mostly been looking at the backs of the individuals' heads, and a description the witness gave three weeks after the offense substantially conflicted with his description at trial. Finally, the witness did not identify defendant until he viewed a lineup some three months after the shooting, and only after he had twice seen photo arrays including defendant's picture. Under the "totality of the circumstances" test, such testimony was insufficient to sustain the conviction. See also, **People v. Rodriguez**, 312 Ill.App.3d 920, 728 N.E.2d 695 (1st Dist. 2000) (conflicting identification testimony insufficient to sustain conviction).

People v. Ford, 195 Ill.App.3d 673, 553 N.E.2d 33 (1st Dist. 1990) Defendant's conviction of delivery of a controlled substance was reversed because the identification of defendant was so vague and doubtful as to create a reasonable doubt.

The undercover officer failed to notice severe scarring on defendant's face or mention the skull cap and bandage covering part of his face. In addition, the initial description of defendant differed somewhat from defendant's actual description. Also, on direct examination the officer testified as to a purchase of cocaine, while on cross-examination he clarified that he had bought heroin. While no single factor was enough to justify reversal, when all the weaknesses and discrepancies were viewed together, the identification testimony was vague and doubtful.

People v. Newbern, 183 Ill.App.3d 995, 539 N.E.2d 875 (4th Dist. 1989) Defendant was tried *in absentia* and convicted of retail theft. A store security guard testified that he saw a black male put cigarettes in his pocket and attempt to leave the store without paying. During a struggle, the guard ripped off the suspect's coat. The suspect then fled. In the coat pocket, the guard found a driver's license bearing the name Carlos Newbern and a photograph. The guard and two other employees identified the photograph as that of the suspect.

An identification at a trial *in absentia* is difficult because the eyewitness cannot point to an in-court defendant as the offender. Here, the evidence established that the offense had been committed by the person pictured on the driver's license, but the evidence did not prove beyond a reasonable doubt that defendant was the person pictured. The similarity of names, without corroboration, was insufficient to sustain the conviction.

People v. Byas, 117 Ill.App.3d 979, 453 N.E.2d 1141 (3d Dist. 1983) Both the photo and lineup identifications by complainant were equivocal, and the identification at the preliminary hearing was made hesitatingly. In addition, the complainant's description of the assailant differed from defendant's appearance. Convictions reversed because the identification was not positive.

People v. Hughes, 59 Ill.App.3d 860, 376 N.E.2d 372 (2d Dist. 1978) Conviction for robbery reversed where the identification testimony of the complainant was dubious and uncertain. The complainant never saw her attackers' faces and observed only their backs and clothing from a distance of 500 yards, and the mode of dress of the perpetrators was not so distinctive as to justify a positive identification.

The State emphasized the numerous inconsistencies in the testimony of the defense alibi witnesses, however the inconsistencies in defendant's case are irrelevant in light of the

State's failure to prove guilt beyond a reasonable doubt.

People v. White, 56 Ill.App.3d 757, 372 N.E.2d 691 (2d Dist. 1978) Defendant's conviction for armed robbery reversed where it rested solely on the identification testimony of one witness, who expressed "some doubt" as to his identification and who failed to identify defendant's photo about five months after the incident.

People v. Lonzo, 20 Ill.App.3d 721, 315 N.E.2d 256 (1st Dist. 1974) Conviction reversed where identification was by two elderly people whose testimony was perfunctory, fragmentary, and almost incoherent.

People v McKibben, 24 Ill.App.3d 692, 321 N.E.2d 362 (1st Dist. 1974) Defendant's conviction of murder (following a bench trial) was reversed for insufficient evidence. The sole identification witness was a narcotics addict who was blind in one eye and "high" on alcohol at the time of the incident. In addition, the witness made a prior statement contradicting portions of his trial testimony and identified defendant from viewing a single photograph.

People v. Hughes, 17 Ill.App.3d 404, 308 N.E.2d 137 (1st Dist. 1974) Conviction reversed. The identification testimony by two witnesses lacks credibility; one witness failed to tell police she was present when it would have been natural to do so, and though she knew defendant she required two viewings at lineup to make an identification. The other witness's testimony contained inconsistencies, and he claimed to be uncertain of his lineup identification because of defendant's hair length, which had not changed since the time of the incident.

People v. King, 10 Ill.App.3d 652, 295 N.E.2d 258 (1st Dist. 1973) Bench trial conviction reversed where complainant, who identified defendant, failed to mention that the assailant had been in her office previously. In addition, she saw defendant in a bar after the incident but did not call the police or tell anyone he had raped her.

People v. Barney, 60 Ill.App.2d 79, 208 N.E.2d 378 (1st Dist. 1965) Reasonable doubt created by discrepancies between defendant's actual height, weight, age, and posture and the description given after the incident. See also, **People v. Marshall**, 74 Ill.App.2d 483, 221 N.E.2d 133 (1st Dist. 1966) (discrepancies in height and weight, plus witness failed to notice mustache).

People v. Moore, 6 Ill.App.3d 932, 287 N.E.2d 130 (1st Dist. 1972) Where defendant was arrested near the crime scene and was identified by his clothes (t-shirt, dark pants, and gym shoes), the Court took judicial notice that defendant and assailant were both dressed in a "frequently used mode of masculine dress." The evidence was insufficient to convict. See also, **People v. Kincy**, 72 Ill.App.2d 419, 219 N.E.2d 662 (1st Dist. 1966) (identification based on jacket was insufficient in light of uncontradicted alibi evidence); **People v. Reed**, 103 Ill.App.2d 342, 243 N.E.2d 628 (1st Dist. 1968) (evidence held insufficient where identification was made by means of a "dark coat").

People v. Fillyaw, 26 Ill.App.3d 486, 325 N.E.2d 315 (1st Dist. 1975) Defendant's conviction for armed robbery at a bench trial was reversed. Defendant, who was arrested in the complaining witness's car (which had been taken during the robbery), was identified by the complainant based upon clothing, dark skin, and large natural hairstyle. However, the

complainant had been told by police that all the men in the lineup had been found in her car, and she admitted she had not viewed her assailant "face-to-face."

People v. Dowaliby, 221 Ill.App.3d 788, 582 N.E.2d 1243 (1st Dist. 1991) Following a jury trial, defendant was convicted of the first degree murder of his seven-year-old daughter. Defendant's wife was also tried for the same offense, but her motion for directed verdict was granted.

Defendant's motion for directed verdict should have been granted because the probative evidence against him was no greater than that against his wife.

The State presented evidence that from 75 yards away, a witness observed a "dark-colored car" near the location where the victim's body was discovered. This witness also saw a person in the driver's seat and the profile of a large nose, but he was not sure of the person's race. The witness testified that the person's nose was similar to defendant's and that one of defendant's cars, a "light-blue Malibu," resembled the car he saw. This identification testimony "was doubtful, vague, unreliable and of no probative value."

People v. Parker, 234 Ill.App.3d 273, 600 N.E.2d 529 (5th Dist. 1992) Defendant was convicted of murder, armed robbery, attempt murder, and aggravated battery based upon the out-of-court statements of three eyewitnesses who identified defendant as the shooter. At trial, all three witnesses repudiated their earlier statements and denied that defendant was responsible. Two of the witnesses claimed that their earlier statements had been coerced, and the third, who had been shot in the incident, testified that he was recovering from surgery and was in great pain when he was interviewed.

The prior inconsistent statements did not establish guilt beyond a reasonable doubt. Although prior inconsistent statements may be considered as substantive evidence by statute, these statements were entitled to little substantive weight in light of the witnesses' subsequent testimony exculpating defendant and challenging the authenticity of their earlier statements.

People v. Williams, 244 Ill.App.3d 669, 614 N.E.2d 367 (1st Dist. 1993) Defendant was convicted of threatening a public official after a 911 operator received a call threatening Mayor Daley. The operator immediately called back the number displayed on her computer screen, talked to defendant, and confirmed that the telephone number was his.

At trial, the State presented a tape recording of these two calls separated by several conversations of police officers. The 911 operator testified that the voices on the two calls were identical. However, an expert could not reach an opinion on whether the voices were the same and testified that the evidence was "far from conclusive."

Defendant testified that he did not make the 911 call. A defense expert testified that the call might be shown as originating from defendant's apartment if placed by a certain brand of cordless phone or if someone had attached a phone to defendant's phone jack in an open panel in the basement. The defense also presented evidence that on a prior occasion when he was in jail and his apartment was empty, a phone call had been listed as originating from his phone.

Conviction reversed. Because the voice expert was unable to come to a conclusion, a prior call had been credited to the apartment when defendant was not present, and the call could have originated through a cordless phone or from the basement, the evidence did not conclusively establish defendant's guilt.

People v. Tomei, 2013 IL App (1st) 112632 (No. 1-11-2632, 2/15/13)

Five factors are used by Illinois courts to evaluate the reliability of an eyewitness identification: (1) the witness's opportunity to view the suspect during the offense; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions; (4) the witness's level of certainty at the time of the identification; and (5) the length of time between the crime and the identification. The court concluded that the identification in this case was sufficient to prove beyond a reasonable doubt that defendant was guilty of criminal trespass to property and criminal damage to property.

1. The first factor was satisfied in that the witness had an adequate opportunity to view the crime although he observed the offense at his home over a live video feed from his business. When considering whether a witness had an adequate opportunity to view the offender at the time of the offense, courts consider whether the witness was close to the accused for a sufficient period of time under conditions adequate for observation. Here, the witness testified that he observed the suspects over a live video feed as they were committing the crimes at his business, that the camera was positioned eight feet off the ground with spotlights that brightened the field of vision, and that the feed was sufficiently clear that he recognized the defendant's face. In addition, a few minutes later he identified defendant after the latter's apprehension by police. The court concluded that under these circumstances, the witness had an adequate opportunity to observe the crime.

The court rejected the argument that the identification was unreliable because the State offered no evidence of the size, clarity, resolution, or zoom of the live video feed. The court analogized the situation to viewing a crime through a telescope. "As long as the telescope was functioning properly, we see no reason why [the witness] would not be able to testify as to what [he or she] observed."

The court also found that the identification testimony did not require foundational proof that the video camera was functioning properly. First, even had there been evidentiary flaws in the foundation, those flaws would have gone only to the weight of the testimony and not to its admissibility. Second, viewing the facts in a light most favorable to the prosecution, in the absence of any evidence that the camera system was malfunctioning there was sufficient evidence for a rational trier of fact to conclude that the camera system was working properly.

2. The second factor was satisfied in that the witness was shown to have paid attention to the video although he was talking to a police dispatcher on the telephone and dressing to go to the crime scene. The witness testified he viewed the feed for a few minutes and recognized the defendant's face at the showup a few minutes later. The court concluded that a rational trier of fact could have concluded that the witness paid sufficient attention to make a positive identification.

3. The third factor was satisfied because the witness gave an adequate description to support the identification. The witness stated that the perpetrators were white males wearing short jackets and dark hats. Despite minor discrepancies, the court concluded that the general descriptions were adequate to allow the trier of fact to find that the identification was reliable.

4. Concerning the witness's level of certainty in the identification, the court found that the witness expressed no uncertainty. The court distinguished this case from those cited by the defendant, in which the defendant was precluded by the trial court from presenting expert evidence concerning the ability of an eyewitness to make an identification. Here, defendant did not attempt to present such evidence and the trial court did not exclude it. Given that the

witness consistently claimed that he was able to identify defendant, this factor was satisfied.

5. The amount of time between the crime and the identification indicated a reliable identification where only 15 minutes elapsed and the defense did not claim that the passage of time affected the identification. The court rejected the argument that the identification was unreliable because it occurred during a showup. The court concluded that the evidence was sufficient to permit a reasonable trier of fact to find that the identification was reliable.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

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§42-7
Accomplice Testimony

People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359 (1963) The uncorroborated testimony of an accomplice, if it satisfies the court or jury beyond a reasonable doubt, is sufficient to sustain a conviction. However, such testimony is attended with serious infirmities, which require the utmost caution in relying upon it alone.

People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983 (1991) The testimony of an accomplice has "inherent weaknesses," is "fraught with dangers of motives such as malice towards the accused, fear, threats, promises or hopes of leniency," and should be accepted "only with utmost caution and suspicion." However, such testimony is sufficient to sustain a criminal conviction if it convinces the jury of defendant's guilt beyond a reasonable doubt. The critical inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Here, the accomplice gave an "explicit eyewitness account of the killings, the details of which were not shaken under cross-examination." In addition, her trial account was essentially corroborated by grand jury testimony she gave just after the offenses, thus rebutting any inference that her testimony was a recent fabrication. Furthermore, many aspects of her testimony were corroborated by other evidence, and the weaknesses of the testimony were apparent to the jury, which believed it nonetheless.

People v. Brown, 185 Ill.2d 229, 705 N.E.2d 809 (1998) Though the testimony of an accomplice has inherent weaknesses, it is sufficient to convict if it convinces the jury of defendant's guilt beyond a reasonable doubt. Here, the accomplice's testimony provided a reasonable basis to convict. First, the accomplice gave a detailed account of the events leading up to the crimes. Second, the accomplice testimony was corroborated in many important respects by both physical and scientific evidence. Third, the jury was made aware of the accomplice's plea agreement and received IPI Crim. No. 3.17, the cautionary instruction on the weight to be given accomplice testimony.

People v. McLaurin, 184 Ill.2d 58, 703 N.E.2d 11 (1998) Though the testimony of an accomplice has inherent weaknesses and should be accepted only with caution, such testimony, whether corroborated or uncorroborated, will sustain a conviction if it convinces the jury of defendant's guilt beyond a reasonable doubt. Here, the jury was informed of the

accomplice's prior inconsistent statements, attempts to conceal her participation in the crimes, and agreement for a reduced sentence in return for her testimony. The jury was also instructed that the testimony of an accomplice is subject to suspicion. Also, there was evidence to corroborate the accomplice's testimony. Under these circumstances, the evidence was sufficient to sustain the conviction.

People v. Newell, 103 Ill.2d 465, 469 N.E.2d 1375 (1984) Defendant was convicted of burglary, on the basis of accountability, for the actions of three co-defendants. The co-defendants, who were using defendant's truck, broke into a house, removed property and divided the proceeds. One of the co-defendants testified for the State and said that defendant participated in the decision to commit the burglary, advised the others of the location of the house and received part of the proceeds. In exchange for his testimony, this witness was not prosecuted. The other two co-defendants testified that defendant took no part in the decision to burglarize the house. It was undisputed that the State's witness used defendant's truck every day.

The uncorroborated testimony by one accomplice was not sufficient to prove guilt. "[W]here the only evidence is the testimony of three accomplices, all convicted felons, one of whom says defendant is guilty and two of whom say he is not, with no corroboration of either view, we simply cannot say there has been proof of guilt beyond a reasonable doubt." See also, **People v. Marshall**, 26 Ill.App.3d 905, 326 N.E.2d 246 (1st Dist. 1975) (direct contradiction of accomplice's testimony is entitled to great weight).

People v. Rivera, 166 Ill.2d 279, 652 N.E.2d 307 (1995) Defendant was convicted, in a bench trial, of first degree murder. The conviction was reversed in federal *habeas corpus* proceedings, and the cause was remanded for a new trial. At the second trial the State introduced the transcript of testimony of an accomplice, Meger. Meger had testified at defendant's first trial, but he died before the second trial. According to Meger's testimony, defendant and a third accomplice (Norman) had committed the murder.

Norman testified for the defense at the second trial and said that he had committed the murder alone, without any involvement by defendant. However, the State impeached Norman with his testimony from his own trial, at which he claimed not to have been involved in the offense and that the crime had been committed by defendant and Meger.

On appeal, defendant argued that he had not been proven guilty beyond a reasonable doubt. He argued that under **People v. Newell**, 103 Ill.2d 465, 469 N.E.2d 1375 (1984), the conflicting testimony of several accomplices is not sufficient to convict. **Newell** was distinguishable. **Newell** was a "very fact-specific case" in that the accomplice who implicated defendant testified under immunity. In addition, his testimony was directly contradicted by two other accomplices and there was no corroborating evidence for either version. Here, by contrast, Meger's testimony was corroborated by the injuries to the victim's body and by Norman's testimony from his own trial, which was admitted as both substantive and impeachment evidence. Therefore, the evidence was sufficient to convict.

People v. Ash, 102 Ill.2d 485, 468 N.E.2d 1153 (1984) The evidence connecting defendant to the crimes consisted of the testimony of an accomplice and the identification of defendant by the victim. The accomplice was seeking lenient treatment and agreed to testify against defendant only after the State threatened to rescind a prior negotiated plea agreement. In addition, the accomplice admitted that he would "do just about anything," including lie, to avoid imprisonment. Also, the identification of defendant by the victim was vague and

doubtful. Conviction reversed.

People v. Wilson, 66 Ill.2d 346, 362 N.E.2d 291 (1977) Defendant's conviction for robbery, which was based on the uncorroborated testimony of an accomplice, was reversed. The accomplice was incarcerated pending the outcome of other indictments, admitted instigating the robbery and was promised immunity. The testimony of the complainant and a police officer helped determine what occurred, but "did not aid in establishing who committed the robbery."

In re Brown, 71 Ill.2d 151, 374 N.E.2d 209 (1978) The evidence was insufficient to support an adjudication of delinquency based on aggravated battery. The finding was based solely on the uncorroborated testimony of a person who himself had originally been charged with the crime. In addition, the testimony varied from prior statements and was improbable, there was no physical evidence, and the defense alibi witnesses were consistent in their testimony.

People v. Pittman, 93 Ill.2d 169, 442 N.E.2d 836 (1982) Defendant was convicted of unlawful delivery of a controlled substance. He contended that the evidence was insufficient in that his conviction was based upon the uncorroborated testimony of an informant who had several narcotics convictions.

The credibility of witnesses is a matter for the trier of fact. The jury was aware of the informer's background, but chose to believe him rather than defense witnesses. In addition, there was no basis in the record to reject the informer's testimony as incredible, and there was "some degree" of corroboration of his testimony. Conviction affirmed.

People v. Jimerson, 127 Ill.2d 12, 535 N.E.2d 889 (1989) Although accomplice testimony is to be viewed with suspicion, it may be sufficient, even in the absence of corroboration, to sustain a conviction.

Here, the jury was given the IPI instruction on accomplice testimony and was aware of the accomplice's prior inconsistent statements. In addition, the accomplice's trial testimony "found corroboration" in a statement she gave police shortly after the murders, which "tended to rebut the inferences, suggested by the defense, that [she] had a motive to testify falsely in this case and that her testimony here was a recent fabrication." Furthermore, though "the State was not able to provide independent corroboration of [her] identification of the defendant as a participant in the offenses, the State was able to corroborate many other important aspects of her testimony."

The jury was entitled to credit the accomplice's testimony and disregard the alibi evidence even though the alibi was supported by a greater number of witnesses. Also, a State witness contradicted the alibi evidence by testifying that he saw defendant in the area of the crime scene at the time defendant claimed he was elsewhere.

People v. Titone, 115 Ill.2d 413, 505 N.E.2d 300 (1986) Defendant and two codefendants were charged with a double murder, armed robbery and aggravated kidnapping.

The principal witness for the State was a woman named DeWulf. She testified that on the night in question she received a call from Gacho, her boyfriend, and was asked to bring a car to his house. She further explained that she saw the defendants bring two people, with their hands tied, out of the house. The people were placed in a car with defendant.

Gacho got into DeWulf's car, stating that "they were going to have to waste 'em." DeWulf followed the other car to a gravel or dirt road, where she heard some shots. Defendant

and the other codefendant came to DeWulf's car, and defendant said "they're dead."

A police officer found the two victims in the trunk of the car. One of them was still alive, and when asked who had shot them, he replied, "Robert Gott or Gotch." There was no physical evidence to connect defendant to the murders.

The day after the crimes, DeWulf voluntarily went to the police station. She was told by police that if she told the truth about the incident she would not be charged. DeWulf testified that after asking a police officer for money, she gave a statement that was consistent with her trial testimony. Later, DeWulf gave a contrary statement to Gacho's attorney.

Defendant contended that the evidence was insufficient to prove him guilty because the only evidence connecting him to the crime came from the uncorroborated testimony of an accomplice (DeWulf). There was no evidence to show that by implicating defendant, DeWulf had hopes of reward from the prosecution. "[T]he only thing asked of her in order to avoid being charged with a crime was that she tell the truth." Conviction affirmed.

People v. Phillips, 127 Ill.2d 499, 538 N.E.2d 500 (1989) Defendant's conviction for murder and other offenses was upheld, though largely based on the testimony of a jail inmate who claimed that defendant had confessed to him. The inmate's testimony contained information about the crimes that was not known to the public, and other evidence tended to corroborate his testimony.

People v. Gnat, 166 Ill.App.3d 107, 519 N.E.2d 497 (2d Dist. 1988) Defendant's conviction for delivery of cocaine was reversed because it was based solely on the inherently suspicious testimony of an accomplice. The accomplice was a drug user who obtained leniency in return for his testimony; in addition, the accomplice did not tell the purchaser at the time of the transaction that the cocaine was being supplied by defendant.

Although defendant was present in the bowling alley when the delivery was made and was seen talking to the accomplice before the transaction, other people present did not hear their conversation and did not see anything change hands.

People v. Ray, 83 Ill.App.3d 1029, 404 N.E.2d 1073 (3d Dist. 1980) Defendant's conviction for burglary was reversed because it was based solely on the testimony of a companion who had pleaded guilty to the same offense. The companion was a reluctant witness, was declared a hostile witness on a narrow issue, repudiated a prior statement, was intoxicated at the time of the offense, couldn't remember the events clearly, and admitted that it was possible that she had committed the crime alone.

People v. Price, 21 Ill.App.3d 665, 316 N.E.2d 289 (1st Dist. 1974) Bench trial conviction reversed. The testimony of accomplices was not significantly corroborated, and was insufficient considering the rewards offered in exchange for their testimony and the comparative backgrounds of the accused and accusers.

People v. Savory, 62 Ill.App.3d 750, 379 N.E.2d 373 (3d Dist. 1978) Defendant's conviction for indecent liberties with a child was reversed because it was based solely on the uncorroborated testimony of a self-proclaimed accomplice, who accused defendant only after defendant had previously accused him of rape.

In re D.R.S., 267 Ill.App.3d 621, 643 N.E.2d 839 (5th Dist. 1994) The uncorroborated testimony of a 16-year-old accomplice was insufficient to prove respondent guilty of residential

burglary. Although a conviction can be based on accomplice testimony, such testimony must be cautiously scrutinized, especially where it is the sole evidence of guilt. Most convictions based solely on uncorroborated accomplice testimony have been reversed for insufficiency of evidence.

Here, the accomplice's testimony was especially suspect because he had been granted immunity and because there was no corroboration of his claim that the respondent had been involved in the offense. He also admitted that he had instigated the crime, lied to the authorities "to get out of trouble," and faced other charges. In addition, his testimony about the events contradicted that of the victim. Finally, the trial court inexplicably found that the evidence established residential burglary but was insufficient to prove theft of a firearm, although the evidence connecting respondent to either offense was identical.

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§42-8
Variance

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) Due process is violated by conviction on a charge not made or tried.

Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961) It is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there was no evidence. See also, **People v. Smith**, 183 Ill.2d 425, 701 N.E.2d 1097 (1998) (error for Appellate Court to affirm felony murder conviction based on predicate that had not been charged).

People v. Bueno, 35 Ill.2d 545, 221 N.E.2d 270 (1966) Where defendant and codefendant were charged with sale of narcotics to a third person, but the evidence established at most that defendant sold narcotics to the codefendant, there was insufficient evidence to support the conviction. "The question is not one of variance but of whether the State proved the charge set forth in the indictment."

People v. Johnson, 65 Ill.2d 332, 357 N.E.2d 1166 (1976) There was a variance between the charge against defendant (that she agreed to perform an act of deviate sexual conduct) and the State's proof at trial (that she offered to do such act). However, the variance was not fatal. When a variance is raised for the first time on appeal, reversal is required only if the variance misled the accused in making her defense or exposed her to double jeopardy. Here, defendant was neither misled nor subjected to the risk of double jeopardy.

People v. Davis, 82 Ill.2d 534, 413 N.E.2d 413 (1980) Defendant alleged that there was a fatal variance between the complaint and the evidence at trial. The complaint alleged disorderly conduct "by threatening Pearl Robinson with bodily harm to her grandson." The evidence at trial showed that defendant threatened Pearl Robinson, but there was no proof of any specific threat to the grandson's physical safety.

Where defendant attacks the complaint for the first time on appeal, a variance will vitiate a trial only if it is "material" and of "such character as may mislead the accused in making his defense or expose him to double jeopardy." Here, the variance was not material and did not mislead defendant in preparing his defense, and the complaint was sufficiently

precise to protect from double jeopardy. Consequently, the phrase referring to the grandson "was unnecessary and could be disregarded as surplusage."

People v. Bohm, 95 Ill.2d 435, 448 N.E.2d 175 (1983) Defendant was convicted of theft. On appeal, he contended for the first time that there was a fatal variance between the charge and proof. The theft complaint alleged that defendant stole gasoline owned by Town and Country Food Store; however, the evidence at trial proved that the gasoline was owned by a Shell service station.

When challenged for the first time on appeal, a variance will require reversal if it misled the accused in making his defense or exposes him to double jeopardy. Here, defendant was not misled, and the trial court record was available to protect against double jeopardy. Consequently, the variance was not fatal.

People v. Alexander, 93 Ill.2d 73, 442 N.E.2d 887 (1982) Defendant was charged with theft in Will County for exerting unauthorized control over a certain automobile "on or about October 31, 1979." The evidence at the bench trial established that defendant exerted unauthorized control over the automobile on November 11, 1979. (Though the evidence showed that defendant stole the automobile on October 31st, the theft occurred in Cook County). The trial judge found defendant guilty, stating that November 11, 1979 was "on or about" October 31, 1979.

The date alleged in an information "need not ordinarily be proved precisely," and proof establishing the offense on another date is "not a fatal variance." Here, the particular time was not an essential element, and the tolling of the statute of limitations was not at issue. In addition, the information was sufficiently specific to allow defendant to prepare his defense, and the information and the record would be sufficient to bar subsequent prosecution for the offense on November 11, 1979.

People v. Hubbard, 46 Ill.2d 563, 264 N.E.2d 144 (1970) Proof that offense was committed on a date other than the precise date alleged in indictment is not a fatal variance.

People v. Nelson, 17 Ill.2d 509, 162 N.E.2d 390 (1959) Variance between name of robbery victim in indictment (Verduzco) and proof at trial (Verdusco) was not fatal. Such a variance is not material unless it causes substantial injury to the accused.

People v. Durdin, 312 Ill.App.3d 4, 726 N.E.2d 120 (1st Dist. 2000) A variance between the charge and the proof is not fatal unless it is material and misleads defendant in mounting a defense or exposes him to double jeopardy. A fatal variance existed where defendant was charged with delivery of less than a gram of cocaine on a public way within 1000 feet of a public school, but the evidence showed that defendant delivered heroin. Because the variance concerned an element of the most serious offense with which defendant was charged, the court refused to "speculate" whether the defense might have changed had the evidence supported the indictment. Instead, because it could not be determined "that no actual prejudice or no realistic possibility of prejudicial uncertainty existed," the conviction was reversed.

People v. Harris, 146 Ill.App.3d 632, 497 N.E.2d 177 (2d Dist. 1986) A defendant cannot be convicted of an uncharged offense that is not a lesser included crime of the offense for which he was charged.

People v. Hobson, 77 Ill.App.3d 22, 396 N.E.2d 53 (3d Dist. 1979) Defendant was improperly convicted of aggravated assault, since he was only charged with aggravated kidnapping. Aggravated assault is not a lesser included offense of aggravated kidnapping. Compare, **People v. Roberts**, 71 Ill.App.3d 124, 389 N.E.2d 596 (5th Dist. 1979) (aggravated assault was a lesser included offense of aggravated kidnaping as charged).

People v. Arenibar, 18 Ill.App.3d 67, 309 N.E.2d 273 (1st Dist. 1974) Conviction for theft reversed. There was a fatal variance where the complaint alleged that property belonged to one individual and the proof showed that it belonged to another.

People v. Daniels, 75 Ill.App.3d 35, 393 N.E.2d 667 (1st Dist. 1979) The armed robbery indictment against defendant alleged that defendant took "U.S. Currency" from the victim. However, the evidence at trial proved, at best, that only a watch was taken.

The State has the burden of proving "all material facts of the offense as charged by the indictment." By "utterly failing to introduce proof to conform to the charge in the indictment," the State failed in its burden at trial. Reversed.

People v. Townsend, 27 Ill.App.3d 101, 326 N.E.2d 417 (1st Dist. 1975) Defendant was convicted, at a bench trial, of criminal damage to property on September 12 and 15 and October 29. Defendant was charged with breaking glass windows of a Democratic Organization Office. The crucial evidence was by a court bailiff-precinct captain, who testified that defendant admitted breaking the windows. That testimony did not specify the dates of such incidents.

Even if defendant's statement conclusively demonstrated that he at some time broke the windows, there is nothing in the record to indicate that he was referring to his activities on the dates charged in the complaints. Thus, the State failed to prove defendant guilty of the offenses with which he was charged.

People v. Steele, 124 Ill.App.3d 761, 464 N.E.2d 788 (2d Dist. 1984) A variance between the date of the offense as specified in the bill of particulars and the date as proved at trial was not reversible error. The record failed to show that defendant was prejudiced by the variance.

Such a variance is not reversible error "unless the date is an essential ingredient of the crime or relates to the running of the statute of limitations." Also, some cases have established that the variance is reversible error where "it misled the defendant in the preparation of his defense" or "where an alibi defense has been used to counter the time or date specified in the bill of particulars," because defendant "may have been misled into failing to gather evidence and witnesses regarding the time and the date the State actually proved."

People v. Noll, 109 Ill.App.3d 306, 440 N.E.2d 335 (4th Dist. 1982) Variance between the bill of particulars (crime occurred at 1:30) and proof (crime occurred at 12:30) was not prejudicial.

People v. Kuykendall, 108 Ill.App.3d 708, 439 N.E.2d 521 (4th Dist. 1982) Defendant was charged with home invasion and unlawful restraint. The evidence showed that defendant and others forced their way into the complainant's apartment. Two persons held the complainant while defendant struck him with fists and a chain. The trial judge directed a verdict on the home invasion charge, and the jury found defendant guilty of unlawful restraint.

The restraint was only incidental to a battery committed against the complainant, and persons other than defendant restrained the complainant. Thus, if defendant was guilty of

unlawful restraint it was on the basis of accountability. However, since no such instruction was given, the conviction was reversed.

People v. Harper, 251 Ill.App.3d 801, 623 N.E.2d 775 (4th Dist. 1993) Defendant, who was charged with aggravated criminal sexual abuse for having sexual intercourse with a 14-year-old girl, gave a statement after his arrest indicating that both oral sex and intercourse had occurred. The jury instructions required that the State establish "sexual penetration," which was defined as "any contact, however slight, between the sex organ of one person and the sex organ of another person, including but not limited to cunnilingus, fellatio, or anal penetration." Defendant claimed that the instructions were improper because the jury could convict him even if it did not unanimously agree on the type of penetration that had occurred.

The jury is required to reach a unanimous conclusion only as to a defendant's ultimate guilt or innocence. Thus, where a general verdict is returned on an offense which can be committed in various ways, unanimity as to the means of commission is unnecessary.

People v. Lattimore, 2011 IL App (1st) 093238 (No. 1-09-3238, 9/2/11)

1. The State must prove the essential elements of the charging instrument. For a variance between the charging instrument and the proof at trial to be fatal, the difference must be material and of such a character as may mislead the defendant in making his defense, or expose the defendant to double jeopardy.

Defendant was charged with aggravated battery, a violation of 720 ILCS 5/12-4(b)(15), in that he "struck James Lee about the body, knowing him to be a merchant, to wit: an employee of Family Dollar Store, who was detaining James Lattimore for an alleged commission of retain theft." Section 12-4(b)(15) makes it unlawful to knowingly and without lawful justification and by any means cause bodily harm to a merchant who detains a person for an alleged commission of retail theft.

Rather than proving that defendant struck Lee about the body as alleged in the indictment, the State proved that he caused Lee to be struck about the body when he struggled with Lee, causing Lee to suffer bodily harm when he was thrown into an object. Because the crime of aggravated battery can be committed by several different acts, a variance between the act charged in the indictment and the act proved at trial is not fatal. The difference between whether defendant struck Lee about the body or caused Lee to be struck about the body relates only to the manner in which defendant caused bodily harm to Lee. Defendant did not demonstrate that the variance between pleading and proof was material, such that it affected the adequacy of the notice of the charge or exposed defendant to double jeopardy.

Similarly, even though the indictment alleged that Lee was an employee of the store, and the evidence proved that he was an employee of a security agency, the variance was not fatal. Defendant has not shown how this difference misled him in preparation of his defense or exposed him to double jeopardy.

2. A "merchant" for purposes of 720 ILCS 5/12/4(b)(15) is defined as "an owner or operator of any retail mercantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee or independent contractor of such owner or operator." 720 ILCS 5/12-4(b)(15); 720 ILCS 5/16A-2.4. An "independent contractor," as opposed to an employee, undertakes to produce a certain result but is not controlled as to the method by which he obtains the result.

The court found the evidence sufficient to prove that Lee acted as an independent contractor as he was employed by a security agency, wore clothing identifying him as a security guard, was assigned to the store where the theft occurred by his employer, and acted pursuant to notice by the store management that defendant attempted to leave the store without paying for merchandise. However, whether Lee was an employee or an independent contractor is immaterial because in either instance, he qualifies as a "merchant" under the statute.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Roe, 2015 IL App (5th) 130410 (No. 5-13-0410, 1/6/15)

An indictment must apprise a defendant of the precise offense he is charged with, and a fatal variance between the indictment and the evidence is a violation of due process and requires reversal of the conviction. To be fatal, a variance must be material and mislead the defendant in making his defense or expose him to double jeopardy.

The State charged defendant with failing to register as a sex offender "within three days of his conviction," but the evidence showed that he failed to register within three days of his release from imprisonment. The court held that this was a nonfatal variance and did not violate due process.

The indictment and the relevant criminal statute must be read together, and both must be interpreted as a whole. The sex offender registration statute requires a convicted offender to register within three days after his conviction or if he is unable to register because he is incarcerated, within three days of his release from imprisonment. 730 ILCS 150/3(c)(3),(4). When read as a whole, the statute provides a clear alternative to the three-day time limit for registering after conviction when it is impossible for an imprisoned offender to register. The indictment charged defendant with the "functional equivalent" of this alternative since defendant had been incarcerated after his conviction and could not have registered. The indictment thus did not have a fatal variance.

Even if the indictment did not specifically apprise defendant of the charge against him, the court found that any variance would not require reversal because it was not material or misleading, and would not expose defendant to double jeopardy. At no point did defendant express a misunderstanding of the charges or argue that he could not register because he was incarcerated. And defendant could not be exposed to double jeopardy since the State would not be able to charge him again with failure to register during the time frame at issue here.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Alexander Muntges, Mount Vernon.)

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